



Mitchell Hamline School of Law
Mitchell Hamline Open Access

Faculty Scholarship

2006

The Character of the Minnesota Tort System

Michael K. Steenson

Mitchell Hamline School of Law, mike.steenenson@mitchellhamline.edu

Publication Information

33 William Mitchell Law Review 239 (2006)

Repository Citation

Steenson, Michael K., "The Character of the Minnesota Tort System" (2006). *Faculty Scholarship*. Paper 54.
<http://open.mitchellhamline.edu/facsch/54>

This Article is brought to you for free and open access by Mitchell Hamline Open Access. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.



mitchellhamline.edu

The Character of the Minnesota Tort System

Abstract

The specific focus of this article is whether the Minnesota tort system is progressive. The answer to that question depends on a number of other questions. First, what are the components of the tort system? Second, what are the primary motivating principles of the system? Third, how is the term “progressive” defined for purposes of evaluating the system, and as applied to the tort system, what conclusions does it yield? Other questions might be whether the tort system in Minnesota is liberal, or conservative, or, perhaps, moderate, with the overriding question of whether those labels make any difference.

Keywords

Minnesota tort law, tort reform

Disciplines

Torts

THE CHARACTER OF THE MINNESOTA TORT SYSTEM

Mike Steenson[†]

I. INTRODUCTION	240
II. MINNESOTA'S TORT SYSTEM	241
A. <i>The Foundation for Common Law Change</i>	241
B. <i>Minnesota Tort Law</i>	244
1. <i>Tort Liability and Family Relationships</i>	245
2. <i>Government Liability</i>	249
3. <i>Products Liability</i>	253
4. <i>Strict Liability</i>	257
5. <i>Exculpatory Clauses</i>	259
6. <i>Landowners' Duties</i>	260
7. <i>Landlord-Tenant</i>	261
8. <i>Duties to Third Persons</i>	262
9. <i>Medical Negligence</i>	264
10. <i>Intentional Infliction of Emotional Distress and</i> <i>Invasion of Privacy – The New Torts</i>	267
11. <i>Negligent Infliction of Emotional Distress</i>	268
12. <i>Defenses</i>	270
13. <i>Vicarious Liability</i>	271
14. <i>Summary</i>	271
III. LEGISLATIVE REFORM	272
A. <i>1978 Reforms</i>	276
B. <i>1980 Reforms</i>	279
C. <i>1986 Reforms</i>	281
D. <i>1988 Reforms</i>	282
E. <i>1990 Reforms</i>	286
F. <i>Reforms Since 1990</i>	289
G. <i>Summary</i>	290
IV. IS THE TORT SYSTEM PROGRESSIVE?	291
V. CONCLUSION.....	294

[†] Margaret H. and James E. Kelley Professor of Tort Law, William Mitchell College of Law.

I. INTRODUCTION

The topic of this symposium is whether Minnesota is progressive. The specific focus of this article is whether the Minnesota tort system is progressive. The answer to that question depends on a number of other questions. First, what are the components of the tort system? Second, what are the primary motivating principles of the system? Third, how is the term “progressive” defined for purposes of evaluating the system, and as applied to the tort system, what conclusions does it yield? Other questions might be whether the tort system in Minnesota is liberal, or conservative, or, perhaps, moderate, with the overriding question of whether those labels make any difference.

As to the first question, the tort system is a mosaic that includes the common law of torts and statutory modifications of that law. The common law is modified in various ways by the legislature. In extreme cases, the common law may be supplanted by legislation, in whole or in part, as with the passage of workers’ compensation acts or no-fault automobile insurance. Legislation may also supplement the common law by filling gaps where the common law is deficient. Civil damage or dram shop acts are good examples. Finally, legislation may simply cut back tort law, such as by capping damages, modifying or eliminating the rule of joint and several liability or the common law collateral source rule, or by limiting or eliminating the availability of punitive damages. A broader look might include an evaluation of the effectiveness of the two primary no-fault systems that limit or eliminate reliance on tort law, the role of insurance law in supporting the tort system, or the system of rules and regulations intended to promote societal safety. This article focuses more narrowly on the common law of torts in Minnesota as it has been structured by the Minnesota Supreme Court and modifications of the common law of torts by the Minnesota State Legislature.

The second question draws not on the academic debate over the appropriate theoretical justifications of tort law, but rather on the Minnesota Supreme Court’s view of the principles that tort law should achieve. Those principles are varied and reflective of the court’s intent to confine the common law within appropriate limits.

The third set of questions, the definition of “progressive” and its application to the tort system in Minnesota, may be the most

difficult question, given the lack of a clear definition of the term “progressive.” The literature abounds with discussions of progressivism, but finding an appropriate definition or sense of what progressivism means is only part of the problem. The last step is to determine whether Minnesota’s tort system fits that definition, and, finally, why it matters.

II. MINNESOTA’S TORT SYSTEM

Standard accounts of tort law typically emphasize the central importance of fault in the development of tort law,¹ refer to a period of expansion of tort law from the 1960s to the 1980s,² and note the ensuing retrenchment of tort law as the expansive rules were limited.³ In general, the evidence of the evolution of Minnesota common law roughly tracks the standard accounts. The discussion that follows focuses first on the supreme court’s view of common law adaptability and then on the court’s specific responses to a variety of recurring issues in tort law in order to determine an appropriate characterization, not of individuals’ decisions, but rather of the body of the court’s tort decisions.

A. *The Foundation for Common Law Change*

In a string of cases spanning almost ninety years, the Minnesota Supreme Court has consistently recognized the adaptability of the common law to changing conditions. *Tuttle v. Buck*,⁴ decided in 1909, is an excellent early example. The plaintiff, a small town barber, alleged that the defendant, a banker, started working as a barber for the purpose of driving the plaintiff out of business.⁵ Justice Elliott,⁶ writing for the court, set out his views,

1. E.g., David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 703–05 (1992).

2. E.g., Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 603 (1992).

3. E.g., Michael L. Rustad and Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 52 (2002).

4. 107 Minn. 145, 119 N.W. 946 (1909).

5. *Id.*

6. Charles B. Elliott was Associate Justice of the Minnesota Supreme Court from 1905 to 1909, when he resigned to accept a presidential appointment as Associate Justice of the Supreme Court of the Philippine Islands. Minnesota State Law Library, Docket Series, *Biographies of Justices and Judges of the Minnesota Appellate courts*, <http://www.lawlibrary.state.mn.us/judgebio.html#elliott> (last visited Nov. 8, 2006). He would have been a Taft appointment, raising a question as to whether

stating:

[T]he common law is the result of growth, and . . . its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions. Necessarily its form and substance has been greatly affected by prevalent economic theories. For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statutes. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individuals from the evils which result from unrestrained business competition. The problem has been to so adjust matters as to preserve the principle of competition and yet guard against its abuse to the unnecessary injury to the individual. So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men cannot always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well-being of society requires that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person. The purpose for which a man is using his own property may thus sometimes determine his rights, and applications of the idea are found in *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541, Id., 92 Minn. 230, 99 N. W. 882, and *Barclay v. Abraham*, 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365.⁷

he might be labeled as a progressive, particularly in light of the views he expressed in his opinion in *Tuttle*.

7. *Tuttle*, 107 Minn. at 148-49, 119 N.W. at 947.

The court held that the plaintiff stated a cause of action.⁸

Forty years later, in *Miller v. Monsen*,⁹ the issue was whether the court should recognize a cause of action by a minor for enticement¹⁰ against the defendant, who enticed his mother away from the family.¹¹ Relying in part on *Tuttle*, the court held that the action should be recognized:

Novelty of an asserted right and lack of common-law precedent therefor are no reasons for denying its existence. The common law does not consist of absolute, fixed, and inflexible rules, but rather of broad and comprehensive principles based on justice, reason, and common sense. It is of judicial origin and promulgation. Its principles have been determined by the social needs of the community and have changed with changes in such needs. These principles are susceptible of adaptation to new conditions, interests, relations, and usages as the progress of society may require.¹²

Miller notes *Tuttle* in emphasizing the capacity of the common law for change.¹³

More recently, in *Vaughn v. Northwest Airlines, Inc.*,¹⁴ the court considered the issue of whether a negligence claim by a passenger with a disability who sustained a shoulder injury because the airline refused to permit her to check all of her bags was preempted by the Minnesota Human Rights Act. The court held that the airline has a common law duty to assist the disabled with carry-on baggage if the carrier has knowledge of the physical disability and need for assistance in order to avoid physical injury, and the injury was reasonably foreseeable to the airline.¹⁵ Relying on *Tuttle* and *Miller*, the court commented on the nature of common law decision making:

Our common law is the result of accumulated experience. It is composed of rules carefully crafted both to reflect our traditions as a state and to address emerging societal

8. *Id.* at 151–52, 119 N.W. at 948.

9. 228 Minn. 400, 37 N.W.2d 543 (1949).

10. The legislature abolished heart balm claims, such as alienation of affections, criminal conversation, seduction, and breach of contract to marry, in 1978. See MINN. STAT. § 553.01 (2004).

11. *Miller*, 228 Minn. at 400, 37 N.W.2d at 544.

12. *Id.* at 406, 37 N.W.2d at 547 (citations omitted).

13. *Id.*, 37 N.W.2d at 547.

14. 558 N.W.2d 736 (Minn. 1997).

15. *Id.* at 744.

needs. See *Miller v. Monsen*, 228 Minn. 400, 407, 37 N.W.2d 543, 547 (1949); *Tuttle v. Buck*, 107 Minn. 145, 148–49, 119 N.W. 946, 947 (1909); see also Prosser § 54, at 359. Law is perhaps no substitute for ethics, and most disputes will be and should be resolved outside a courtroom. As a practical matter, tort may never encompass every duty of good citizenship that we commonly expect from each other. But in this case, a legal duty cannot be denied.¹⁶

In *Lake v. Wal-Mart Stores, Inc.*,¹⁷ in which the supreme court adopted three prongs of the tort of invasion of privacy, the court explained that “[the common law] is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights,” that “[the common law] must change as society changes and new rights are recognized,” and that “[t]o be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions.”¹⁸

B. Minnesota Tort Law

Basic negligence principles were established by the supreme court by 1910, when the court decided *O'Brien v. American Bridge Co.*,¹⁹ but common law change is evident throughout the supreme court's torts cases as the court expanded and rounded out the law of negligence. Strict liability made an early appearance in Minnesota, but met with limited acceptance in the twentieth century. This section scans a variety of Minnesota Supreme Court tort law decisions in order to provide a broader picture of what common tort liability looks like in Minnesota, but also a rough sense of what motivated the court to decide specific cases in a certain way. The policies that the supreme court has articulated in its decisions as it patrols the corners of tort law vary. There is no single rationale or set of policy justifications that guides the court in deciding torts cases. In part, the view of the tort system depends on the time frame. Aside from adopting new causes of action, the court has also removed barriers to the imposition of liability, particularly during the 1960s and 1970s. While adhering to the fault concept, the court removed governmental and intra-family

16. *Id.*

17. 582 N.W.2d 231 (Minn. 1998).

18. *Id.* at 234, (the latter proposition citing *Tuttle v. Buck*, 107 Minn. 145, 148–49, 119 N.W. 946, 947 (1909)).

19. 110 Minn. 364, 366–67, 125 N.W. 1012, 1013 (1910).

immunities as bars to liability,²⁰ although the scope of government liability has continued to be problematic.

The court has been particularly concerned about undue extensions of liability and the impact those extensions might have on the tort-litigation system as a whole. Its decisions also reflect a concern that tort law be kept within appropriate limits, that it not inappropriately invade the domain of contract law, and that due regard be given to separation of powers. Throughout the decisions, there is a core fault concept that limits undue extensions of tort law. Products liability theory is an excellent example, as the court has moved from strict liability to a negligence-based theory in design-defect and failure-to-warn cases. The court has also on occasion emphasized the compensatory²¹ and deterrence²² functions of tort law. In general, its decisions closely tailor liability to fault. Sometimes, however, the court has sanctioned the imposition of strict liability rules based upon a particular group's superior cost-bearing capabilities. The cases discussed span roughly fifty years.

The court is also concerned about achieving balance in the tort system. Sovereign immunity is a good example. While abolishing sovereign immunity, and reading the concept restrictively as far as damages limitations, the court has developed and applied defenses to governmental tort liability that restrict the liability of governmental entities.

1. Tort Liability and Family Relationships

The supreme court chipped away at intra-family tort immunities over a period of years. In 1966, the court abolished the immunity of an unemancipated child in *Balts v. Balts*.²³

20. Charitable immunities, however, never gained a foothold in Minnesota. See *Mulliner v. Evangelischer Diakonniessenverein*, 144 Minn. 392, 398, 175 N.W. 699, 701 (1920).

21. *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 279 (Minn. 1995) (Stringer, J., dissenting) (noting that tort cases are intended to provide compensation for the injured person); *Thompson v. Petroff's Estate*, 319 N.W.2d 400, 405 (Minn. 1982) ("Under modern tort theory, the primary reason for the existence of a cause of action is to provide a means of compensation for the injured victim.").

22. *Phelps*, 537 N.W.2d at 279 (Stringer, J., dissenting) (adding that deterrence is also an important function of the tort system, but that it operates through the damages mechanism).

23. 273 Minn. 419, 142 N.W.2d 66 (1968).

We are of the opinion that experience has demonstrated no necessity for continuing the doctrine of immunity as a defense in tort actions brought by a parent against a child. Our conclusion is influenced by the increasing frequency and severity of automobile accidents and the seriousness of attendant injuries to members of the same household. The fact that in most instances the driver is covered by liability insurance minimizes the likelihood of intrafamily discord. While, of course, our decision will also affect the uninsured and will reach into family activities beyond the operation of an automobile, the prospect of vexatious or collusive litigation we believe has no substantial basis. Only where a serious wrong has been committed is it likely that children's torts will be brought to the attention of the courts. Otherwise, we are persuaded that the good judgment, restraint, and discernment of parents, lawyers, judges, and juries will act as an effective deterrent to the prosecution of fraudulent or frivolous litigation.²⁴

The court abolished parent-child tort immunity in *Silesky v. Kelman*²⁵ in 1968, except in cases "(1) where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."²⁶

In 1969, in *Beaudette v. Frana*,²⁷ the supreme court called interspousal immunity "the last vestige of the judicially established rule of intrafamily immunity in actions for tort,"²⁸ and it abolished the immunity.²⁹ Surveying the immunities, the court noted that the favored rationale for abrogation of any of the family immunities "is that the social gain of providing tangible financial protection for those whom an insured wrongdoer ordinarily has the most natural motive to protect transcends the more intangible social loss of impairing the integrity of the family relationship."³⁰

But the court was not quite finished with immunities. In

24. *Id.* at 433, 142 N.W.2d at 75.

25. 281 Minn. 431, 161 N.W.2d 631 (1968).

26. *Id.* at 442, 161 N.W.2d at 638.

27. 285 Minn. 366, 173 N.W.2d 416 (1969).

28. *Id.* at 367, 173 N.W.2d at 417.

29. *Id.* at 373, 173 N.W.2d at 420.

30. *Id.* at 371, 173 N.W.2d at 419.

*Anderson v. Stream*³¹ in 1980, the court relied on the *Balts* rationale to totally abolish parent-child tort immunity, removing the immunity exceptions it had retained in *Silesky*.³²

In cases involving injury to family relationships, the common law permitted husbands to recover for loss of consortium for injuries to their wives, but the traditional rule denied wives and children the right to recover for loss of consortium because of injuries to husbands and fathers.³³ In *Thill v. Modern Erecting Co.*,³⁴ the court modified the traditional rule to permit a wife to recover for loss of consortium for injuries caused to her husband by the negligent act of a third party.³⁵ In *Plain v. Plain*,³⁶ the court held that a child could not recover damages for loss of maternal services from his or her mother for negligently injuring herself.³⁷ In *Salin v. Kloempken*,³⁸ in 1982, the court held that a child was not entitled to recover for loss of parental consortium for injuries to his parents caused by the negligent acts of third parties. While recognizing the sympathetic and logical appeal of the claims,³⁹ the court found the countervailing policy reasons against recognition too strong:

If the claim were allowed there would be a substantial accretion of liability against the tortfeasor arising out of a single transaction (typically the negligent operation of an automobile). Whereas the assertion of a spouse's demand for loss of consortium involves the joining of only a single companion claim in the action with that of the injured person, the right here debated would entail adding as many companion claims as the injured parent had minor children, each such claim entitled to separate appraisal and award. The defendant's burden would be further enlarged if the claims were founded upon injuries to both parents. Magnification of damage awards to a single family derived from a single accident might well become a serious problem to a particular defendant as well as in

31. 295 N.W.2d 595 (Minn. 1980).

32. *See id.* at 600–01 (overruling *Silesky v. Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968)).

33. *See, e.g., Eschenbach v. Benjamin*, 195 Minn. 378, 380–81, 263 N.W. 154, 156 (1935), *overruled in part by* *Thill v. Modern Erecting Co.*, 284 Minn. 508, 514, 170 N.W.2d 865, 870 (1969).

34. 284 Minn. 508, 170 N.W.2d 865 (1969).

35. *See id.* at 513, 170 N.W.2d at 869.

36. 307 Minn. 399, 240 N.W.2d 330 (1976).

37. *See id.* at 402–03, 240 N.W.2d at 332.

38. 322 N.W.2d 736 (Minn. 1982).

39. *Id.* at 737.

terms of the total cost of such enhanced awards to the insured community as a whole.⁴⁰

In addition, procedural problems aside, the court was concerned about the intangible nature of the child's loss and the difficulty of assessing damages, which further created the potential for double recovery.⁴¹ The court also expressed concern about the impact of damages awards for loss of parental consortium:

We also cannot ignore the social burden of providing damages for loss of parental consortium merely because the money to pay such awards comes initially from the negligent defendant or his insurer. Realistically the burden of paying damage awards will be borne by the public generally in increased insurance premiums or, alternatively, in the enhanced danger that accrues from the greater number of people who may choose to go without insurance. Moreover, we must take into account the cost of administration of a system to determine and pay consortium awards. Since virtually every injury to a parent with minor children would be accompanied by a claim for loss of parental consortium, the expenses of settling or litigating these claims would be sizable. The social cost resulting from the expenditure of valuable judicial resources in litigating these claims would be substantial.⁴²

In arriving at its conclusion, the court emphasized that it recognized its authority and obligation to change the common law in response to changing social conditions, and that its decision was not based on the rationale of some cases that deferred to the legislature on the issue.⁴³

In 1990, in *Larson v. Dunn*,⁴⁴ the supreme court refused to recognize a new tort of interference with custodial rights. The supreme court focused on the steady increase of family law litigation over the previous twenty-five years and the necessity it illustrated to both the court and legislature of focusing not only on the interests of the parents in disputes over children, but also on the best interests and welfare of their children. The court

40. *Id.* at 740 (quoting *Russell v. Salem Transp. Co.*, 295 A.2d 862, 864 (N.J. 1972)).

41. *Id.*

42. *Id.* at 741 (citation omitted).

43. *Id.*

44. 460 N.W.2d 39 (Minn. 1990).

concluded that adding a new tort to an area where intrafamily disputes are rife would not be in the interests of the affected children.⁴⁵

2. *Government Liability*

Subject to legislative action, the supreme court abolished municipal tort immunity in 1962 in *Spanel v. Mounds View School District No. 621*,⁴⁶ and sovereign immunity in *Nieting v. Blondell*.⁴⁷ In *Nieting*, the court explained:

One of the paramount interests of the members of an organized and civilized society is that they be afforded protection against harm to their persons, properties, and characters. The logical extension of that interest is that, if harm is wrongfully inflicted upon an individual in such a society, he should have an opportunity to obtain a reasonable and adequate remedy against the wrongdoer, either to undo the harm inflicted or to provide compensation therefor. If the state is properly to serve the public interest, it must strive, through its laws, to achieve the goals of protecting the people and of providing them with adequate remedies for injuries wrongfully inflicted upon them. So long as the state fails to do so, it will be functioning in conflict with the public interest and the public good.⁴⁸

The court has read the concept of sovereign immunity restrictively. In *Wilson v. City of Eagan*,⁴⁹ the supreme court interpreted the political subdivision tort claims act to permit a claim for punitive damages against municipal officers and employees.⁵⁰ The court's analysis was based in part on policy arguments that limited the scope of sovereign immunity and permitted the award of punitive damages in light of its recognition that sovereign immunity was an exception:

[S]overeign immunity is an exception to the general tort rules that one should be liable for the harm one causes and for punitive damages in the appropriate case. Consequently, sovereign immunity should be treated

45. *Id.* at 45–47.

46. 264 Minn. 279, 118 N.W.2d 795 (1962).

47. 306 Minn. 122, 235 N.W.2d 597 (1975).

48. *Id.* at 131, 235 N.W.2d at 602–03.

49. 297 N.W.2d 146 (Minn. 1980).

50. *Id.* at 149–50 (interpreting MINN. STAT. § 466.04, subdiv. 1a (1978)).

restrictively so that the underlying purposes and philosophy of our tort law, including the provisions for punitive damages, can be given effect. Thus, the statute should be read restrictively, not expansively. . . . [T]he potential for abuse of power by municipal officers and employees in ways that could cause harassment, invasion of privacy, or injury to property low in value is great.⁵¹

In *Loven v. City of Minneapolis*,⁵² the court reiterated its statement in *Wilson* that the tort liability cap should be read restrictively to achieve the underlying purposes and philosophy of Minnesota tort law.⁵³ In this case, the court rejected the City of Minneapolis's argument that the \$750,000 cap on damages against it also included payments of no-fault benefits.⁵⁴

But notwithstanding the judicial elimination of sovereign immunity and the court's restrictive application of sovereign immunity, there are important limitations on the liability of governmental entities and their employees. Discretionary immunity, now called statutory immunity to avoid confusion,⁵⁵ is preserved in the state and municipal tort claims statutes.⁵⁶ It insulates governmental entities from liability for planning-level decisions that involve political, economic, or social factors.⁵⁷ The supreme court has consistently interpreted the exception narrowly.⁵⁸

Most recently, in *Schroeder v. St. Louis County*,⁵⁹ the supreme court held that a county had statutory immunity for its decision to permit the operator of a grading machine to operate a grader against traffic, because the decision was a policy-making decision at the planning level. Justice Hanson, concurring in part and dissenting in part, pointed out that the application of past

51. *Id.*

52. 639 N.W.2d 869 (Minn. 2002).

53. *Id.* at 872.

54. *Id.* at 873.

55. *Janklow v. Minn. Bd. of Exam'rs for Nursing Home Adm'rs*, 552 N.W.2d 711, 716 (Minn. 1996).

56. See MINN. STAT. §§ 3.736, subdiv. 3(b), 466.03, subdiv. 6 (2004).

57. See *Schroeder v. St. Louis County*, 708 N.W.2d 497, 514 (Minn. 2006); *Conlin v. City of Saint Paul*, 605 N.W.2d 396, 400 (Minn. 2000); *Fisher v. County of Rock*, 596 N.W.2d 646, 652 (Minn. 1999); *Holmquist v. State*, 425 N.W.2d 230, 232 (Minn. 1988).

58. See *Conlin*, 605 N.W.2d at 400; *Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 219 n.5 (Minn. 1998); *Angell v. Hennepin County Reg'l Rail Auth.*, 578 N.W.2d 343, 346 (Minn. 1998).

59. 708 N.W.2d 497 (Minn. 2006).

precedent on statutory immunity would result in refusal to consider important policy issues involved in such cases.⁶⁰ Not considering these policy issues creates a problem because it allows the county to immunize itself from liability by making a cost-benefit judgment:

A governmental body that is charged with responsibility for the safety of the roads should obviously be discouraged from creating dangerous conditions on those roads. Further, a governmental body whose conduct creates a common law duty to warn its citizens about a dangerous condition should not be allowed to unilaterally immunize itself from liability by simply engaging in the process of weighing the risk of harm to the public against some competing policy concerns of the government, especially purely economic concerns. And, because the government's decision to forgo certain expenditures will provide benefits to all taxpayers, it is not fair to require a single innocent victim to bear all of the cost of the adverse consequences of that decision.

Moreover, if a governmental entity is immune, and therefore has no risk of loss for negligent acts, then it has nothing to balance against forgoing the expenditure. Carried to the extreme, immunity could encourage the government to abdicate many of its most important responsibilities by making policy decisions to save the expenses necessary to execute them. Could a county, for example, allow travelers to continue to use an unsafe bridge, without warning, because it weighed the safety of the travelers against budget constraints that made it financially difficult to make the bridge safe? One would hope not, but the extension of the discretionary function exception to the deliberate abdication of governmental responsibilities, purely for cost-saving reasons, could produce precisely that extreme result.

In fact, it is anomalous that a governmental body may obtain immunity from liability under the discretionary function exception by engaging in the very conduct that would increase the culpability of a private party. For example, products liability cases routinely hold that a product manufacturer who knows of a dangerous condition but defers correction by engaging in a cost-benefit analysis, balancing human lives against corporate

60. *Id.* at 513–14 (Hanson, J., concurring in part and dissenting in part).

profits, has demonstrated such “callous indifference to public safety” as to be subject to punitive damages.⁶¹

The court has also interposed other limitations on the liability of governmental entities and their employees. Official immunity is intended to shield officials from individual liability when their jobs call for the exercise of judgment or discretion in the performance of their duties, unless they act willfully or maliciously.⁶² If official immunity applies to a government official, the Minnesota Supreme Court has made the decision to extend vicarious official immunity to the governmental entity employing that official.⁶³ Not all jurisdictions have made the same decision, but the court took the position in *Pletan v. Gaines*⁶⁴ that on balance, and considering the deterrence and compensation objectives of tort law, the best policy was to apply vicarious official immunity; this avoids the potential pressure of tort liability compromising the performance of government employees’ official duties because of the threat that liability will be imposed on their governmental employer.⁶⁵ Vicarious official immunity is routinely applied in the Minnesota cases.

Aside from official and vicarious official immunity, the supreme court has created an additional limitation on governmental liability in cases where liability turns on statutory violations by governmental officials. The approach, while not without criticism,⁶⁶ precludes liability in cases where government

61. *Id.* at 512 (citing *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 384 (Cal. Ct. App. 1981)).

62. *See, e.g.,* *Mumm v. Mornson*, 708 N.W.2d 475 (Minn. 2006); *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 673 (Minn. 2006); *Anderson v. Anoka Hennepin Indep. Sch. Dist.* 11, 678 N.W.2d 651, 655–56 (Minn. 2004); *Gleason*, 582 N.W.2d at 220; *Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992); *Elwood v. Rice County*, 423 N.W.2d 671 (Minn. 1988).

63. *Pletan v. Gaines*, 494 N.W.2d 38 (Minn. 1992).

64. *Id.*

65. *Id.* at 42–43. The court’s specific holding was limited to high-speed chases by the police and bolstered by what it perceived to be the legislature’s implicit recognition of vicarious official immunity in the Crime Victims Reparations Act. *Id.* at 42 (citing MINN. STAT. § 611A.52, subdiv. 6(c)(3) (1992)). Of course, if official immunity is inapplicable to the official, the governmental entity will not be able to take advantage of vicarious official immunity. *See Mumm*, 708 N.W.2d at 493 (noting the governmental entity was not protected by vicarious official immunity because its employee was not entitled to official immunity).

66. *See Hage v. Stade*, 304 N.W.2d 283, 289 (Minn. 1981) (Scott, J., dissenting) (the “majority opinion reintroduces into Minnesota law the proposition that ‘the king can do no wrong’ under the guise of the public-duty rule”); *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 808–12 (Minn. 1979)

has violated a statute creating only a general duty to the public, but permits the imposition of liability in cases where a special duty of care is owed to the injured person.⁶⁷ In *Radke v. County of Freeborn*,⁶⁸ a 2005 case arising out of the death of a nineteen-month-old child who was beaten to death by a friend of his mother, the supreme court held that the county was subject to liability in negligence for its investigation of child abuse and neglect reports required by Minnesota's Child Abuse Reporting Act.⁶⁹

3. *Products Liability*

Minnesota rounded out negligence law in a series of products liability cases decided in the 1950s and 1960s,⁷⁰ and in 1959 the court eliminated the privity hurdle in implied warranty of merchantability cases.⁷¹ Building on those decisions, the supreme court followed the national shift to strict liability in tort in 1967 in *McCormack v. Hanksraft Co.*,⁷² even though the theory was not directly pled nor instructed on at trial and was urged by the plaintiffs for the first time on appeal to the supreme court.⁷³ The court followed the standard policy rationale supporting strict liability in tort:

[I]n our view, enlarging a manufacturer's liability to those injured by its products more adequately meets public-policy demands to protect consumers from the inevitable risks of bodily harm created by mass production and complex marketing conditions. In a case such as this, subjecting a manufacturer to liability without proof of negligence or privity of contract, as the rule intends, imposes the cost of injury resulting from a defective product upon the maker, who can both most effectively

(Kelly, J., dissenting).

67. *E.g.*, *Andrade v. Ellefson*, 391 N.W.2d 836, 842–43 (Minn. 1986) (finding that the Public Welfare Licensing Act created a special duty between the county and small children); *Cracraft*, 279 N.W.2d at 806–08 (holding that the city's duty of inspection pursuant to a local fire ordinance did not create a special duty).

68. 694 N.W.2d 788 (Minn. 2005).

69. MINN. STAT. § 626.556 (2004).

70. *See* *Rosin v. Int'l Harvester*, 262 Minn. 445, 115 N.W.2d 50 (1962); *Hofstedt v. Int'l Harvester Co.*, 256 Minn. 453, 98 N.W.2d 808 (1959); *Johnson v. West Fargo Mfg. Co.*, 255 Minn. 19, 95 N.W.2d 497 (1959); *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, 79 N.W.2d 688 (1956).

71. *Beck v. Spindler*, 256 Minn. 543, 563, 99 N.W.2d 670, 683 (1959).

72. 278 Minn. 322, 154 N.W.2d 488 (1967).

73. *Id.* at 340, 154 N.W.2d at 501.

reduce or eliminate the hazard to life and health, and absorb and pass on such costs, instead of upon the consumer, who possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences.⁷⁴

By 1984, however, strict liability theory had been reeled back to a negligence base. In *Bilotta v. Kelley Co.*,⁷⁵ the supreme court adopted a risk-utility approach to design-defect cases,⁷⁶ and three years later, in *Kallio v. Ford Motor Co.*,⁷⁷ the court, while refusing to make the requirement of a feasible alternative part of the plaintiff's prima facie case for proof of a design defect, noted that proof of a feasible alternative is nonetheless a relevant and important part of proof in design cases.⁷⁸

In *Germann v. F.L. Smithe Machine Co.*,⁷⁹ the court stated that it "has adopted the position that strict liability for failure to warn is based upon principles of negligence."⁸⁰ The court's position in design-defect and failure-to-warn cases is consistent with the more moderate position on those issues taken in the *Restatement (Third) of Torts: Products Liability*.⁸¹

The treatment of strict liability theory in Minnesota is consistent with negligence theory, which bears out Justice Simonett's observation in *Holm v. Sponco Manufacturing, Inc.*,⁸² that even in strict liability cases the notion of "wrongness" surfaces in any attempt to define what a defect is in a product, certainly under a consumer expectation standard⁸³ and, he added later in his separate opinion in *Bilotta v. Kelley Co.*,⁸⁴ where a risk-utility standard is utilized.

The court's decision in *Whiteford v. Yamaha Motor Corp.*⁸⁵ is a good example of just how limiting the application of negligence

74. *Id.* at 338, 154 N.W.2d at 500.

75. 346 N.W.2d 616 (Minn. 1984).

76. *Id.* at 622.

77. 407 N.W.2d 92 (Minn. 1987).

78. *Id.* at 96-97.

79. 395 N.W.2d 922 (Minn. 1986).

80. *Id.* at 926 n.4. The court reaffirmed *Germann* in *Huber v. Niagara Machine and Tool Works*, 430 N.W.2d 465, 468 n.1 (Minn. 1988).

81. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (a), (b) (1998).

82. 324 N.W.2d 207, 213-16 (Minn. 1982) (Simonett, J. concurring in part and dissenting in part).

83. *Id.* at 215.

84. 346 N.W.2d 616, 625-26 (Minn. 1984).

85. 582 N.W.2d 916 (Minn. 1998).

principles can be. The five-year-old plaintiff in the case sustained serious injuries when the toboggan he was riding slid under a stationary Yamaha Snowscoot snowmobile.⁸⁶ His face was seriously cut by a bracket under the snowmobile, resulting in permanent disfigurement.⁸⁷ The supreme court held that the trial court appropriately granted summary judgment to the defendants on the basis that there was no duty to guard against the kind of injury that the plaintiff sustained because it was not foreseeable as a matter of law.⁸⁸ Even though it acknowledged that the foreseeability issue is a jury issue in close cases,⁸⁹ the court, relying on three non-Minnesota decisions from the 1950s and 1960s,⁹⁰ held that the injury was not foreseeable as a matter of law.⁹¹

The supreme court has wrestled with the problem of establishing boundaries in products liability. In *80 South Eighth Street Ltd. Partnership v. Carey-Canada*,⁹² the supreme court considered whether its previously formulated economic loss doctrine⁹³ barred the owner of a building with asbestos-containing fireproofing from recovering under negligence or strict liability theories for the costs of maintenance, removal, and replacement of the fireproofing. The court had earlier held that economic losses arising out of commercial transactions, except claims involving personal injury or damage to other property, may not be recovered under negligence and strict products liability.⁹⁴ The economic loss doctrine, the court said in *Carey-Canada*, balances two conflicting societal goals.⁹⁵ One encourages marketplace efficiency through the voluntary allocation of economic risks, and the other

86. *Id.* at 917.

87. *Id.*

88. *Id.* at 919.

89. *Id.* at 918.

90. *See id.* at 918–19. (citing and discussing *Schneider v. Chrysler Motors Corp.*, 401 F.2d 549 (8th Cir. 1968); *Kahn v. Chrysler Corp.*, 221 F.Supp. 677 (S.D. Tex. 1963); *Hatch v. Ford Motor Co.*, 329 P.2d 605 (Cal. Dist. Ct. App. 1958)). The District of Columbia Court of Appeals, however, questioned the continuing validity of *Kahn* and *Hatch* in *Knippen v. Ford Motor Co.*, 546 F.2d 993, 1001 (D.C. Cir. 1976), because they were inconsistent with the law governing crashworthiness.

91. *Whiteford*, 582 N.W.2d at 919.

92. 486 N.W.2d 393 (Minn. 1992).

93. The legislature has twice intervened in the area by adopting statutes governing the regulation of economic loss claims. MINN. STAT. §§ 604.01, 604.101 (2004).

94. *Superwood v. Simpelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981), *overruled by Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990).

95. 486 N.W.2d at 396.

discourages conduct that leads to physical harm.⁹⁶ The court's dilemma was applying the economic loss doctrine in a case where the physical hazard of asbestos exposure was minimized and removed, resulting in economic loss. The court held that the costs relating to maintenance, removal, and replacement could be recovered in tort, and permitting recovery would advance "both the rationale and public policy objectives of tort law and the Uniform Commercial Code."⁹⁷ The rationale for imposing liability for the losses turned on the court's view of the importance of manufacturers' responsibility in products liability cases and the reasonableness of a building owner's response in attempting to avoid or minimize the risk of injury to building occupants.⁹⁸

The supreme court at one point limited the availability of punitive damages in products liability cases involving property damage. In *Eisert v. Greenberg Roofing & Sheet Metal Co.*,⁹⁹ the supreme court held that punitive damages were not available in an action solely for the recovery of injury to property, concluding that the "interests implicated in strict liability actions for injury solely to property are not so great as to warrant extension of this controversial remedy."¹⁰⁰ The court took the same position twelve years later in *Independent School District No. 622 v. Keene Corp.*¹⁰¹ The court concluded in those cases that refusing to permit punitive damages in products liability cases involving only property damage reflects the fact that society places a higher value on the safety of persons than it does on the security of property.¹⁰²

Eisert and *Keene Corp.* reflected the court's "intent to control escalating lawsuits and awards in product liability actions where the only damage is to property."¹⁰³ The supreme court overruled those decisions in *Jensen v. Walsh*,¹⁰⁴ relying in part on the punitive damages statute, which states that punitive damages are permitted where there is deliberate disregard of the rights "or" safety of

96. *Id.*

97. *Id.* at 398.

98. *Id.*

99. 314 N.W.2d 226 (Minn. 1982), *abrogated by* *Jensen v. Walsh*, 623 N.W.2d 247 (Minn. 2001).

100. *Id.* at 229.

101. 511 N.W.2d 728 (Minn. 1994), *overruled by* *Jensen v. Walsh*, 623 N.W.2d 247 (Minn. 2001).

102. *Keene Corp.*, 511 N.W.2d at 732; *Eisert*, 314 N.W.2d at 229.

103. *Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn. 2001).

104. *Id.*

others;¹⁰⁵ this focuses on the conduct of the wrongdoer rather than the damage caused, and in part on the purposes of punitive damages, which are intended to “punish the perpetrator, to deter repeat behavior and to deter others from engaging in similar behavior.”¹⁰⁶

4. *Strict Liability*

Minnesota has approached strict liability cases cautiously. The supreme court recognized the strict liability principles of *Rylands v. Fletcher*¹⁰⁷ in early escape cases,¹⁰⁸ but it moved cautiously in later strict liability cases. In *Sachs v. Chiat*,¹⁰⁹ a 1968 case involving property damage caused by pile driving concussion, the supreme court recognized the early decisions¹¹⁰ but, without establishing clear principles for the application of strict liability theory, the court concluded that the pile driving could be classified “as an inherently dangerous or ultrahazardous activity.”¹¹¹

More recently, in two cases involving strict liability issues, the court backed away from strict liability based on a risk-utility analysis, and without adopting a specific strict liability formulation. In *Ferguson v. Northern States Power Co.*,¹¹² a case involving a high-voltage power line accident that occurred while a man and his son were trimming trees in their back yard, the supreme court considered the risk in the case so unusual that it invited oral argument on the issue of whether strict liability should apply in the case. The court ultimately rejected the theory. In considering the application of the Restatement’s strict liability theory for abnormally dangerous activities,¹¹³ the court noted that a convincing argument could be made for making the utility strictly liable, and that “spreading the

105. *Id.* at 251 (construing MINN. STAT. § 549.20, subdiv. 1 (2000)).

106. *Id.* at 251 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (W. Page Keeton et al. eds., 5th ed. 1984)).

107. 3 L.R.-E. & I. App. 330 (H.L. 1868) (appeal taken from Ex.).

108. *See* *Bridgeman-Russell Co. v. City of Duluth*, 158 Minn. 509, 511, 197 N.W. 971, 972 (1924) (water main); *Wiltse v. City of Red Wing*, 99 Minn. 255, 260, 109 N.W. 114, 115 (1906) (reservoir collapse); *Berger v. Minneapolis Gaslight Co.*, 60 Minn. 296, 298, 62 N.W. 336, 336–37 (1895) (groundwater contamination); *Cahill v. Eastman*, 18 Minn. 324 (1872) (escape of water from tunnel construction).

109. 281 Minn. 540, 162 N.W.2d 243 (1968).

110. *Id.* at 542 n.2, 162 N.W.2d at 245 n.2.

111. *Id.* at 544, 162 N.W.2d at 246.

112. 307 Minn. 26, 239 N.W.2d 190 (1976).

113. The court worked from RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (Tent. Draft No. 10 1964).

cost of serious injury over all consumers of electricity is equitably more appealing.”¹¹⁴ But the court rejected the theory, “persuaded by the amicus briefs which detail the severe economic consequences which may be sustained by the many small electric utilities in the state by the abrupt imposition of such a rule.”¹¹⁵

Mahowald v. Minnesota Gas Co.,¹¹⁶ from 1984, held that strict liability principles did not apply to a case involving an explosion that caused escaping gas from the utility’s gas line. The court followed its decisions in 1907’s *Gould v. Winona Gas Co.*¹¹⁷ and ensuing cases, concluding that strict liability should not apply. The court was unwilling to deviate from that settled precedent.

The plaintiffs in the case argued that the liability of a gas distributor should be governed by the *Restatement (Second) of Torts*, sections 519 and 520.¹¹⁸ The court recognized that it had noted those sections in other cases, but that it had done nothing other than simply recognize the existence of those provisions. In addition, the court recognized that other jurisdictions had rejected strict liability in similar contexts.¹¹⁹

While recognizing that gas distributors have been held to a high standard of care in those jurisdictions, the court also rejected strict liability theory on policy grounds. The court acknowledged the high degree of danger involved in cases involving leaking gas, and that the insurance rationale that the dissent urged the court to adopt was not unattractive; but the court reasoned that if liability were imposed, it would be the ratepayers who would absorb the cost of loss.¹²⁰ The court recognized that the impact of imposing strict liability would result in homeowners insurance companies shifting the loss they contracted to pay to the gas company, even if the gas company were free from negligence.¹²¹

In contrast, the legislature adopted strict liability under the Minnesota Environmental Response Act.¹²² One of the primary

114. *Ferguson* 307 Minn. at 32, 239 N.W.2d at 193–94. Although not applying strict liability, the court noted that the power company should be held to a “high degree of care.” *Id.* at 33, 239 N.W.2d at 194 (quoting *Anderson v. Eastern Minn. Power Co.*, 197 Minn. 144, 149, 266 N.W. 702, 704 (1936)).

115. *Id.* at 32, 239 N.W.2d at 194.

116. 344 N.W.2d 856 (Minn. 1984).

117. 100 Minn. 258, 111 N.W. 254 (1907).

118. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1965).

119. *Mahowald*, 344 N.W.2d at 861.

120. *Id.* at 862.

121. *Id.*

122. MINN. STAT. §§ 115B.01–.20 (2004).

purposes of the Act is to impose strict liability on those who are responsible for the release of hazardous substances.¹²³ Section 115B.04 of the Act provides, subject to certain exceptions, that “any person who is responsible for a release or threatened release of a hazardous substance from a facility is strictly liable, jointly and severally, for” certain response costs and damages resulting from the release or threatened release of the hazardous substance.¹²⁴

5. *Exculpatory Clauses*

Tort and contract law intersect in cases involving exculpatory clauses. Exculpatory clauses are not favored in the law and are strictly construed against the party who benefits from the clause.¹²⁵ While the Minnesota Supreme Court has upheld exculpatory clauses,¹²⁶ the clauses are not enforceable if they are ambiguous, if they release the benefiting party from liability for intentional, willful, or wanton acts, or if they are in violation of public policy.¹²⁷

In deciding whether an exculpatory clause is in violation of public policy, the court considers “(1) whether there was a disparity in bargaining power between the parties and (2) the types of services being offered or provided, taking into consideration whether they are public or essential services.”¹²⁸ In *Yang v. Voyagaire Houseboats, Inc.*,¹²⁹ the supreme court held that an exculpatory clause in a houseboat rental agreement violated public policy. Concluding that Voyagaire was in the position of an innkeeper, the court held “that as a matter of public policy, Voyagaire cannot circumvent its duty to protect its guests by requiring the guests to sign a rental agreement containing an exculpatory clause that purports to release Voyagaire from liability for the resort’s negligence.”¹³⁰

123. *State v. Employers Ins. of Wausau*, 644 N.W.2d 820, 824 (Minn. Ct. App. 2002); *Musicland Group, Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 529 (Minn. Ct. App. 1993) (citing Alan C. Williams, *A Legislative History of the Minnesota "Superfund" Act*, 10 WM. MITCHELL L. REV. 851, 858 (1984)).

124. MINN. STAT. § 115B.04, subdiv. 1 (2004).

125. *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982).

126. *See id.* at 926.

127. *Id.* at 923–26.

128. *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 789 (Minn. 2005).

129. *Id.*

130. *Id.* at 791.

6. *Landowners' Duties*

In *Peterson v. Balach*,¹³¹ the supreme court decided to “squarely face the issue of why the law relating to the duties of owners and occupiers of land to invitees and licensees should not be merged with general negligence law.”¹³² Following the national trend, the court held that “[a]n entrant’s status as a ‘licensee,’ or ‘invitee’ is no longer controlling, but is one element, among many, to be considered in determining the landowner’s liability under ordinary standards of negligence.”¹³³

In *Pietila v. Congdon*,¹³⁴ the court made clear that in deciding *Peterson* it did not intend to impose any new duties on landowners. The court appears to have returned to settled forms to resolve cases involving landowners’ duties. In *Baber v. Dill*,¹³⁵ for example, rather than analyzing the landowner’s duty in general negligence terms as prescribed by *Peterson*, the court said that “[a]nalysis of a cause of action against a landowner for negligence begins with an inquiry into whether the landowner, Dill, owed the invitee, William Baber, a duty.”¹³⁶ The duty standard was drawn from section 343A of the *Restatement (Second) of Torts*: “A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.”¹³⁷ The court also established as a controlling principle the rule that “[a] possessor of land . . . has no duty to an invitee where the anticipated harm involves dangers so obvious that no warning is necessary.”¹³⁸ The rationale for the rule “is that ‘no one needs notice of what he knows or reasonably may be expected to know.’”¹³⁹

The court recognized that there is a fine distinction between open and obvious dangerous conditions and activities that the

131. 294 Minn. 161, 199 N.W.2d 639 (1972).

132. *Id.* at 167, 199 N.W.2d at 644.

133. *Id.* at 173, 199 N.W.2d at 647.

134. 362 N.W.2d 328, 332 (Minn. 1985).

135. 531 N.W.2d 493 (Minn. 1995).

136. *Id.* at 495.

137. RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965). The court had previously quoted section 343 in *Peterson v. W.T. Rawleigh Co.*, 274 Minn. 495, 496–97, 144 N.W.2d 555, 557 (1966).

138. *Baber*, 531 N.W.2d at 496.

139. *Id.* (quoting *Sowles v. Urschel Lab., Inc.*, 595 F.2d 1361, 1365 (8th Cir. 1979)).

possessor should anticipate will result in harm and those that are so open and obvious that the possessor need not anticipate harm, but it was a distinction the court chose to make in concluding that “a landowner has no duty to an invitee to warn or make safe known and obvious conditions when that invitee has assisted in creating those conditions.”¹⁴⁰ The court held that the defendant owed no duty to the plaintiff, stating that “[t]o hold a landowner has a duty to warn an invitee of danger created, in part, by that individual is untenable.”¹⁴¹

While the court abandoned the common-law classifications in *Peterson*, status is still relevant. When status is coupled with obviousness of the danger, the court has two mechanisms to achieve the control that the common-law classification previously provided in the form of specific duty rules governing the status of entrants on land.

7. *Landlord-Tenant*

Concerns about unlimited liability have prompted courts to limit the liability of landlords for injuries to their tenants. In general, Minnesota follows the common-law rule that landlords are not liable to their tenants for injuries caused by defective conditions on the leased premises,¹⁴² but there are exceptions. A landlord may be held liable for failing to disclose a dangerous condition about which the landlord knows or has reason to know if the tenant, in the exercise of reasonable care, could not be expected to discover the danger;¹⁴³ for failing to use reasonable care in making repairs;¹⁴⁴ for failing to use reasonable care to keep common areas safe for tenants using those areas;¹⁴⁵ or for premises that are leased for public use where structural defects or failure to take reasonable precautions create a danger for users.¹⁴⁶

Aside from the standard exceptions, the supreme court has also been careful to limit the liability of landlords, such as when the issue is whether the landlord-tenant relationship is a special

140. *Baber*, 531 N.W.2d at 496.

141. *Id.*

142. *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002).

143. *Johnson v. O'Brien*, 258 Minn. 502, 506, 105 N.W.2d 244, 247 (1960).

144. *Canada v. McCarthy*, 567 N.W.2d 496, 504 (Minn. 1997).

145. *Nubbe v. Hardy Cont'l Hotel Sys. of Minn., Inc.*, 225 Minn. 496, 31 N.W.2d 332 (1948).

146. *Lyman v. Hermann*, 203 Minn. 225, 229, 280 N.W. 862, 864 (1938).

relationship that would justify imposing a duty on the landlord to guard against misconduct by a third person.¹⁴⁷ The court has also refused to impose liability on a landlord for building code violations, unless the landlord knew or should have known of the violation.¹⁴⁸

8. *Duties to Third Persons*

The supreme court has been cautious in approaching the issue of duties to third persons,¹⁴⁹ whether the issue concerns the duty to a person who is in a compromised position¹⁵⁰ or the duty to guard against the misconduct of a third person.¹⁵¹ The court has taken the position that there is generally no duty to act for the protection of third persons absent some special relationship,¹⁵² either between the defendant and plaintiff¹⁵³ or the defendant and a third person

147. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 674 (Minn. 2001).

148. *Gradjelick v. Hance*, 646 N.W.2d 225, 232 (Minn. 2002). The court said that four factors are necessary to establish liability for violations of the Uniform Building Code: (1) the landlord or owner knew or should have known of the code violation; (2) the landlord or owner failed to take reasonable steps to remedy the violation; (3) the injury suffered was the kind the code was meant to prevent; and (4) the violation was the proximate cause of the injury or damage. *Id.*

149. *See Funchess*, 632 N.W.2d at 674 (“We are generally cautious and reluctant to impose a duty to protect between those conducting business with one another.”).

150. *See Gilbertson v. Leininger*, 599 N.W.2d 127 (Minn. 1999) (rejecting host liability for a dinner guest who suffered head injury after drinking alcoholic beverages); *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789 (Minn. 1995) (holding that lodging house owed no duty to prevent residents from committing suicide).

151. *See Pietila v. Congdon*, 362 N.W.2d 328, 333 (Minn. 1985) (finding no basis to impose a duty on a homeowner to protect persons invited to his home from the criminal activities of third persons).

152. *Radke v. County of Freeborn*, 694 N.W.2d 788, 793 (Minn. 2005); *Clark v. Whittemore*, 552 N.W.2d 705, 707 (Minn. 1996). *See, e.g., Walker v. Kennedy*, 338 N.W.2d 254, 255 (Minn. 1983) (finding no special relationship between owner of property where alcohol was provided at a party and a minor who attended the party, became intoxicated, and caused injury to a third person); *Delgado v. Lohmar*, 289 N.W.2d 479, 484 (Minn. 1979) (finding a special relationship between hunters using high-powered rifles to warn third-person landowner, if aware of his presence). The special relationships supporting a duty include parent-child, master-servant, and owner-licensee relationships and cases where a person is in charge of another with dangerous propensities. *Id.* at 483–84. The rule is inapplicable in premises liability cases turning on whether there is a dangerous condition on the land. *Louis v. Louis*, 636 N.W.2d 314, 320–21 (Minn. 2001).

153. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARMS § 40 (Proposed Final Draft No. 1, 2005), covers duties in cases where the person subject

who causes the injury.¹⁵⁴ The reason for the limited duty turns on the older common-law distinction between misfeasance and nonfeasance.¹⁵⁵

In cases involving the duty of property owners to prevent the misconduct of a third person, the Minnesota Supreme Court has emphasized the following policy considerations:

[C]rime prevention is essentially a government function, not a private duty; criminals are unpredictable and bent on defeating security measures; and because the issue arises where existing security precautions have failed, the question will always be whether further security measures were required and a property owner will have little idea what is expected of him or her.¹⁵⁶

to liability is in a special relationship with the person who sustains injury. It reads as follows:

- (a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.
- (b) Special relationships giving rise to the duty provided in Subsection (a) include:
 - (1) a common carrier with its passengers,
 - (2) an innkeeper with its guests,
 - (3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises,
 - (4) an employer with its employees who are:
 - (a) in imminent danger; or
 - (b) injured and thereby helpless,
 - (5) a school with its students,
 - (6) a landlord with its tenants, and
 - (7) a custodian with those in its custody, if: a) the custodian is required by law to take custody or voluntarily takes custody of the other; and b) the custodian has a superior ability to protect the other.

154. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARMS § 41 (Proposed Final Draft No. 1, 2005), covers duties in cases where the person subject to liability is in a special relationship with the person who causes the injury. It reads as follows:

- (a) An actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship.
- (b) Special relationships giving rise to the duty provided in Subsection (a) include:
 - (1) a parent with dependent children,
 - (2) a custodian with those in its custody,
 - (3) an employer with employees when the employment facilitates the employee's causing harm to third parties, and
 - (4) a mental-health professional with patients.

155. RESTATEMENT (SECOND) OF TORTS § 314, cmt. c (1965).

156. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 673 n.4 (Minn. 2001)

In other cases, the court has emphasized that absent a vulnerable plaintiff who is dependent on the defendant,¹⁵⁷ the defendant is simply not in a position to protect the plaintiff and cannot reasonably be expected to do so.¹⁵⁸

Duties to third persons have also been restricted in cases involving professional malpractice. In cases involving legal malpractice, the plaintiff must ordinarily establish the existence of an attorney-client relationship in order to be entitled to recover against the attorney.¹⁵⁹ There is a limited exception for cases where the sole purpose of a client in retaining an attorney is to directly benefit a third party.¹⁶⁰

9. Medical Negligence

In general, the supreme court has been moderate in medical negligence cases. The modified locality rule applies to medical negligence actions.¹⁶¹ Specialists are held to a national standard of care.¹⁶²

In 1977, in *Cornfeldt v. Tongen*,¹⁶³ the Minnesota Supreme Court followed the national trend in recognizing a cause of action for negligent nondisclosure of risks related to the proposed treatment or alternatives to that treatment. In *Pratt v. University of Minnesota Affiliated Hospitals*,¹⁶⁴ a case involving a genetic diagnosis, the court noted that the right of a patient to know is not limited to choice of treatment after a disease is present and conclusively diagnosed, since there are important decisions that must be made in many non-treatment cases where medical care is given, "including procedures leading to a diagnosis," but that "mere diagnosis, without more, does not give rise to a duty to disclose risks concerning conditions not diagnosed."¹⁶⁵

But if there is negligent diagnosis, the supreme court held in

(citing *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 169 (Minn. 1989)).

157. See *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995).

158. *Gilbertson v. Leininger*, 599 N.W.2d 127, 131-32 (Minn. 1999).

159. *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 448 (Minn. 2002).

160. *Id.* at 448 n.4; *Marker v. Greenberg*, 313 N.W.2d 4, 5 (Minn. 1981).

161. *Lundgren v. Eustermann*, 370 N.W.2d 877, 880 (Minn. 1985).

162. *McCormack v. Lindberg*, 352 N.W.2d 30, 36 (Minn. Ct. App. 1984).

163. 262 N.W.2d 684, 699 (Minn. 1977).

164. 414 N.W.2d 399 (Minn. 1987).

165. *Id.* at 402.

Molloy v. Meier,¹⁶⁶ a case of first impression decided in 2004, that “a physician’s duty regarding genetic testing and diagnosis extends beyond the patient to biological parents who foreseeably may be harmed by a breach of that duty.”¹⁶⁷

In negligence actions, including medical negligence, the plaintiff has the burden of proving the elements¹⁶⁸ of the case by a preponderance of the evidence, including proof that the defendant’s negligence caused the plaintiff’s injuries.¹⁶⁹ The supreme court has been reluctant to deviate from those requirements. Two examples involve *res ipsa loquitur* and loss of a chance theory.

In *Ybarra v. Spangard*,¹⁷⁰ a 1944 California Supreme Court case, the court applied *res ipsa loquitur*¹⁷¹ in a divided control case in which it was not clear which of the set of defendants who might have caused the plaintiff’s injury were responsible.¹⁷² The court shifted to the defendants the burden of explaining which of them was responsible.¹⁷³ The Minnesota Supreme Court rejected the application of *Ybarra* in *Hoven v. Rice Memorial Hospital*¹⁷⁴ because of its concern that “[a]doption of that analysis would put the burden on the defendants to show how plaintiff’s injury occurred and that the injury was caused by no negligence on the part of any team member—in most cases creating what would amount to absolute

166. 679 N.W.2d 711 (Minn. 2004).

167. *Id.* at 719.

168. See *Plutshack v. Univ. of Minn. Hosps.*, 316 N.W.2d 1, 5 (Minn. 1982) (observing that to establish a *prima facie* case a plaintiff must prove by expert testimony “(1) the standard of care recognized by the medical community as applicable to the particular defendant’s conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant’s departure from the standard was a direct cause of [the] injuries”).

169. See *Walton v. Jones*, 286 N.W.2d 710, 715 (Minn. 1979).

170. 154 P.2d 687 (Cal. 1944).

171. The Minnesota Supreme Court set out the elements of *res ipsa loquitur* in *Spannaus v. Otolaryngology Clinic*, 308 Minn. 334, 337, 242 N.W.2d 594, 596 (1976):

[B]efore a plaintiff is entitled to submit his claim to the jury on the theory of *res ipsa loquitur*, he must establish three things with regard to the injury-producing event: (1) The event must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

172. *Ybarra*, 154 P.2d at 687.

173. *Id.* at 691.

174. 396 N.W.2d 569 (Minn. 1986).

liability.”¹⁷⁵

In some cases, a physician may be negligent in failing to diagnose a patient's disease and the patient ultimately dies from the disease. Under the traditional rule, the plaintiff is unable to prove that the physician's negligence was more probably than not a cause of the death, even though the physician's negligence may have deprived the patient of a substantial chance of survival.¹⁷⁶ A majority of jurisdictions have accepted the loss of a chance theory,¹⁷⁷ but the Minnesota Supreme Court rejected the theory in *Fabio v. Bellomo*.¹⁷⁸

Claims for wrongful birth, life, and conception have been cutting-edge torts. The claims arise in cases where the defendant physician failed to provide expecting parents with information concerning the likelihood that their child would be born with serious birth defects. In such cases, the child is born with serious birth defects and the mother makes a claim for wrongful birth, and the child makes a claim for wrongful life. While the child's claim for wrongful life is routinely denied,¹⁷⁹ most jurisdictions that have considered the issue have allowed the claim for wrongful birth by the mother.¹⁸⁰ Minnesota bars both wrongful life actions and wrongful birth actions by statute because of the legislative concern over permitting any action based on a claim that the fetus would have been aborted.¹⁸¹ In *Hickman v. Group Health Plan, Inc.*,¹⁸² the

175. *Id.* at 573.

176. DAN B. DOBBS, *THE LAW OF TORTS* § 178 (2000).

177. Tory A. Weigand, *Loss of Chance in Medical Malpractice: A Look at Recent Developments*, 70 DEF. COUNS. J. 301, 301 (2003). In *Smith v. Parrott*, 833 A.2d 843, 846 (Vt. 2003), the Vermont Supreme Court rejected the loss of a chance theory, noting that there is also substantial support for the traditional approach. *Id.*

178. 504 N.W.2d 758, 762 (Minn. 1993).

179. See DOBBS, *supra* note 176, § 291. Courts permitting a child to recover for a wrongful life claim limit recovery to medical expenses that would otherwise have been recoverable by the parents in a wrongful birth action. *Id.*

180. *Id.*

181. MINN. STAT. § 145.424, subdvs. 1, 2 (2004), reads as follows:

Subdivision 1. Wrongful life action prohibited. No person shall maintain a cause of action or receive an award of damages on behalf of that person based on the claim that but for the negligent conduct of another, the person would have been aborted.

Subd. 2. Wrongful birth action prohibited. No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted.

In *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004), the Minnesota Supreme Court held that the statute did not bar a mother's claim for negligent failure to diagnose a genetic condition. The mother argued that her claim should

Minnesota Supreme Court held that the lack of a common-law remedy for wrongful birth and life dictated the conclusion that the issue was in the exclusive province of the legislature¹⁸³ and upheld the statute against constitutional challenges based on Fourteenth Amendment equal protection and Article I, section 8, of the Minnesota Constitution.¹⁸⁴

Prior to the adoption of that legislation barring wrongful life and wrongful birth actions, the Minnesota Supreme Court recognized an action for wrongful conception in *Sherlock v. Stillwater Clinic*.¹⁸⁵ The legislature specifically preserved the wrongful conception action,¹⁸⁶ obviously in response to *Sherlock*.¹⁸⁷

10. Intentional Infliction of Emotional Distress and Invasion of Privacy – The New Torts

In recent years, the Minnesota Supreme Court adopted two new causes of action: intentional infliction of emotional distress in 1983, in *Hubbard v. United Press International, Inc.*,¹⁸⁸ and invasion of privacy in 1998, in *Lake v. Wal-Mart Stores, Inc.*¹⁸⁹ Compared with

not be prohibited because had she received the necessary information she would have sought a tubal ligation, not an abortion. *Id.* at 722.

182. 396 N.W.2d 10 (Minn. 1986).

183. *Id.* at 13.

184. *Id.* at 13–14.

185. 260 N.W.2d 169, 170 (Minn. 1977). The court held that damages in wrongful conception actions “may include all prenatal and postnatal medical expenses, the mother’s pain and suffering during pregnancy and delivery, and loss of consortium,” and that “the parents may recover the reasonable costs of rearing the unplanned child subject to offsetting the value of the child’s aid, comfort, and society during the parents’ life expectancy.” *Id.* at 170–71.

186. Minnesota Statutes section 145.424, subdivision 3 (2004), reads as follows:

Subd. 3. Failure or refusal to prevent a live birth. Nothing in this section shall be construed to preclude a cause of action for intentional or negligent malpractice or any other action arising in tort based on the failure of a contraceptive method or sterilization procedure or on a claim that, but for the negligent conduct of another, tests or treatment would have been provided or would have been provided properly which would have made possible the prevention, cure, or amelioration of any disease, defect, deficiency, or handicap; provided, however, that abortion shall not have been deemed to prevent, cure, or ameliorate any disease, defect, deficiency, or handicap. The failure or refusal of any person to perform or have an abortion shall not be a defense in any action, nor shall that failure or refusal be considered in awarding damages or in imposing a penalty in any action.

187. See *Hickman*, 396 N.W.2d at 14 n.5.

188. 330 N.W.2d 428, 438 (Minn. 1983).

189. 582 N.W.2d 231, 236 (Minn. 1998).

when these causes of action were adopted in other states, the court came late in both instances. Since the adoption of those torts, however, the court has kept a tight rein on them. In *Hubbard*, the court emphasized the high threshold of proof necessary to establish the claim of intentional infliction of emotional distress,¹⁹⁰ a cue the courts have taken to heart, making such a claim exceptionally difficult to win,¹⁹¹ and to date the court has not broadly interpreted the boundaries of the invasion of privacy tort.¹⁹²

11. *Negligent Infliction of Emotional Distress*

Negligent infliction of emotional distress claims provide an interesting indication of the court's reluctance to extend tort liability. The Minnesota Supreme Court adopted a liberal zone-of-danger rule in 1892 in *Purcell v. St. Paul City Railway*,¹⁹³ and it has continued to adhere to that rule.¹⁹⁴ In 1980, in *Stadler v. Cross*,¹⁹⁵ the court rejected the more liberal bystander recovery rule, initially adopted by the California Supreme Court in 1968,¹⁹⁶ in favor of the zone of danger rule. The court emphasized the importance of establishing limitations on negligent infliction of emotional distress claims that are "workable, reasonable, logical, and just as possible."¹⁹⁷ The court rejected arguments that the bystander recovery rule would result in a proliferation of claims or increase the potential for fraudulent claims and create unduly burdensome liability,¹⁹⁸ but it was concerned about establishing workable limits for the tort – limits that could be consistently and meaningfully applied by courts and juries.¹⁹⁹

More recently, in *Engler v. Illinois Farmers Insurance Co.*,²⁰⁰ the supreme court considered the issue of whether a mother, who was

190. *Hubbard*, 330 N.W.2d at 439.

191. See *Langeslag v. KYMN, Inc.*, 664 N.W.2d 860, 864–70 (Minn. 2003); Michael K. Steenson, *The Anatomy of Emotional Distress Claims in Minnesota*, 19 WM. MITCHELL L. REV. 1, 36–37 (1993).

192. See *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553–54 (Minn. 2003).

193. 48 Minn. 134, 139, 50 N.W. 1034, 1035 (1892).

194. See Michael Steenson, *Engler v. Illinois Farmers Insurance Co. and Negligent Infliction of Emotional Distress*, 32 WM. MITCHELL L. REV. 1335 (2006).

195. 295 N.W.2d 552, 554–55 (Minn. 1980).

196. *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

197. 295 N.W.2d at 554.

198. *Id.* at 555 n.3.

199. *Id.* at 554.

200. 706 N.W.2d 764 (Minn. 2005).

in the zone of danger and suffered emotional distress as a result of fear for the safety of her son who was hit by a car, should be entitled to recover for her emotional distress in witnessing her son's injuries.²⁰¹ The court was not asked to reconsider *Stadler* and the zone of danger rule, but it was asked to expand the damages that are recoverable beyond earlier statements of the zone of danger rule apparently confining recovery to damages for fear for one's own safety.²⁰²

The court in *Engler* held that "a plaintiff may recover damages for distress caused by fearing for another's safety or witnessing serious injury to another" if the plaintiff proves she "(1) was in the zone of danger of physical impact; (2) had an objectively reasonable fear for her own safety; (3) had severe emotional distress with attendant physical manifestations; and (4) stands in a close relationship to the third-party victim."²⁰³ The court also added a fifth requirement: "the plaintiff also must establish that the defendant's negligent conduct—the conduct that created an unreasonable risk of physical injury to the plaintiff—caused serious bodily injury to the third-party victim."²⁰⁴ The court chose not to define what sort of "close relationship" is necessary to support recovery, preferring to leave the issue open for case-by-case development.²⁰⁵

The case is interesting in part because of the rhetoric surrounding the issue. Facially, it seemed to be noncontroversial. A mother suffered severe emotional distress when she witnessed her son being hit and seriously injured by a car.²⁰⁶ She was also placed in harm's way in the accident.²⁰⁷ It might be surprising that the question would narrow to whether the emotional distress should somehow be parsed, with her recovery limited only to emotional distress that she suffered because of fear for her own safety, but the usual "sky is falling" arguments of excessive litigation and undue expansion of liability were made, sharpening the issue and requiring supreme court attention to resolve it.²⁰⁸ The court rejected the arguments but thought it was important to emphasize

201. *Id.* at 765–66.

202. *Id.* at 767–68.

203. *Id.* at 770.

204. *Id.* at 770–71.

205. *Id.* at 772.

206. *Id.* at 766.

207. *Id.*

208. *Id.* at 765.

in its opinion that it was not creating a new cause of action for negligent infliction of emotional distress cases, but only expanding the damages that could be awarded to a person who was already in the zone of danger when she witnessed injury to her son.²⁰⁹

12. *Defenses*

The supreme court's consideration of defenses to negligence claims has of course been in the context of comparative negligence or fault, since the comparative negligence statute was enacted in 1969. The supreme court has stated that it has liberally applied comparative fault principles²¹⁰ in applying a flexible fault standard to the negligence of children,²¹¹ or in disallowing the defense in cases involving very small children.²¹² The court has also held that comparative fault principles are inapplicable in cases where the defense of contributory negligence would be inconsistent with the defendant's statutory²¹³ or common-law obligations.²¹⁴ Liberal, in that sense, means restricting the availability of contributory negligence in certain cases.

On the other hand, the court has also construed the statute in ways that severely restrict an injured person's right to recover. The Comparative Fault Act requires a comparison of the fault of the injured person to the fault of the *person* against whom recovery is sought.²¹⁵ The supreme court has construed the Act to require individual and not aggregate comparisons of fault.²¹⁶ The only clear exception is for cases where the defendants are engaged in a joint venture.²¹⁷ In addition, the court requires the fault of all

209. *Id.* at 771.

210. *Tomfohr v. Mayo Found.*, 450 N.W.2d 121, 123 (Minn. 1990).

211. *See Toetschinger v. Ihnot*, 312 Minn. 59, 63–65, 250 N.W.2d 204, 207–08 (1977).

212. *See Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 743 (Minn. 1980) (upholding the trial court's determination that a child aged four years and one-and-a-half months could not be negligent as a matter of law).

213. *See Zerby v. Warren*, 297 Minn. 134, 140–41, 210 N.W.2d 58, 63 (1973) (sale of glue to minor in violation of statute).

214. *See Sandborg v. Blue Earth County*, 615 N.W.2d 61, 64 (Minn. 2000) (jailer's duty to protect detainee from risk of suicide); *Tomfohr*, 450 N.W.2d at 123 (health care provider's duty to patient known to be suicidal).

215. MINN. STAT. § 604.01, subdiv. 1 (2004).

216. *Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795, 798 (Minn. 1982). The jury found the plaintiff was thirty-five percent at fault, the manufacturer of the tool she was using when injured twenty percent at fault, and the plaintiff's employer, Bayliner Boats, forty-five percent at fault. *Id.*

217. *See Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 208, 203

parties to the “transaction” to be compared, even if a party to the transaction is not a party to the lawsuit.²¹⁸ The two rules, in combination, significantly restrict the right of the injured person to recover in cases involving multiple parties.

13. *Vicarious Liability*

The supreme court’s acceptance of vicarious liability, a rule of strict liability, is not based on an employer’s fault, but rather “a public policy determination that liability for acts committed within the scope of employment should be allocated to the employer as a cost of engaging in that business.”²¹⁹ The standard for making the vicarious liability determination is whether (1) “the source of the attack is related to the duties of the employee,” and (2) “the assault occurs within work-related limits of time and place.”²²⁰ In cases involving intentional torts, the supreme court held that it was unnecessary that the employee act in furtherance of the employer’s interests for it to be vicariously liable.²²¹ Employers may also be directly liable under negligent hiring,²²² retention,²²³ or supervision²²⁴ theories in cases where an employee commits a tort that results in injury to third persons.

14. *Summary*

As the cases illustrate, the supreme court has relied on an array of policy reasons in sorting out its torts decisions. Which policy concerns are relevant is issue-dependent. Aside from noting the compensatory and deterrence objectives of tort law, the court’s decisions often turn on the sometimes explicitly stated and sometimes implicit policy of ensuring personal accountability

N.W.2d 841, 846 (1973).

218. Hosley v. Armstrong Cork Co., 383 N.W.2d 289, 293 (Minn. 1986).

219. Fahrendorff *ex rel.* Fahrendorff v. N. Homes, Inc., 597 N.W.2d 905, 910 (Minn. 1999).

220. Lange v. Nat’l Biscuit Co., 297 Minn. 399, 404, 211 N.W.2d 783, 786 (1973).

221. Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 311 (Minn. 1982).

222. Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983).

223. J.M. v. Minn. Dist. Council of Assemblies of God, 658 N.W.2d 589, 597 (Minn. Ct. App. 2003); Olson v. First Church of Nazarene, 661 N.W.2d 254, 264 (Minn. Ct. App. 2003), *citing* Yunker v. Honeywell, Inc., 496 N.W.2d 419, 423 (Minn. Ct. App. 1993).

224. Semrad v. Edina Realty, Inc., 493 N.W.2d 528, 533–34 (Minn. 1992).

through the tort system. In some cases, the focus may be on whether a certain class of persons would be superior cost bearers, as in the court's strict liability cases. Other policies, relevant in duty determinations, include the administrative workability of a rule or the social costs of a particular liability rule. The court may also be motivated by its understanding of the need for constraint in cases where tort and contract law intersect. There is no single theory of tort liability that has driven the court's decisions, an unsurprising finding given case-by-case structuring of common law rules. The nature of judicial decision-making, spanning time, changing social conditions, and continually shifting court composition make it difficult to characterize the body of a court's work with labels. The court has sometimes expanded the right to recovery when, for example, it abrogates immunities, and sometimes contracted it, as when it concluded that strict liability is limited by negligence principles in products liability cases. Both a liberal label, in the sense of enhancing tort remedies, and a conservative label, in the sense of contracting tort remedies or maintaining the status quo, might potentially be applicable, depending on the area of law being considered.

III. LEGISLATIVE REFORM

A recent study by the Pacific Research Institute establishes indexes that evaluate the condition of the tort system in each state relative to the tort systems in the other states and ranks them in order of the success of the degree of tort reform they have achieved.²²⁵

The foreword to the report, written by former Michigan Governor John Engler, states that the study confirms that "the health of a state's civil-justice system is a key indicator of its economic vitality and potential for future growth," and that "[a] fair, stable, and predictable legal environment is critical to a state's ability to attract investment, draw new businesses, and generate new jobs."²²⁶ The concern is that "unfair and outdated liability laws reward lawsuit abuse, impede job creation, and impose higher costs on everything consumers buy—from new cars to medical care."²²⁷

225. LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, U.S. TORT LIABILITY INDEX: 2006 REPORT (2006).

226. John Engler, *Introduction* to MCQUILLAN & ABRAMYAN, *supra* note 225, at 1.

227. *Id.*

The foreword similarly emphasizes the importance of law reform in promoting “stronger economic growth and higher personal income.”²²⁸ Noting that the goal of tort law is “to efficiently deter wrongdoers and fully compensate unjustly injured victims,” the report states that achieving that balance in the system eliminates meritless litigation and excessive awards.²²⁹

The report, considering all results, divides states into three groups: saints, sinners, and salvageable. The “sinners” category includes states that are likely to fall in future rankings because they have relatively high monetary tort losses and significant threats, but yet have few, if any, comprehensive reforms. Minnesota falls somewhere in the middle, while it ranked forty-fifth in substantive law rules and reforms.²³⁰

The American Tort Reform Association (ATRA) publishes a Tort Reform Record twice a year.²³¹ It focuses on various areas, including joint and several liability, the collateral source rule, punitive damages reform, noneconomic damage reform, prejudgment interest, product liability reform, class action reform, attorney retention sunshine, appeal bond reform, and jury service reform.²³² The preferred positions would lead to cutbacks on the availability of tort remedies. The Association is dedicated to reforming the tort system, for reasons similar to those of the Pacific Research Study.²³³

The pro-tort-reform responses to imbalance are based on limited views of the system. There is no general analysis of the structure of tort law in each jurisdiction. Rather, the studies focus on the most obvious and easiest to illustrate points in a legal system. Either there is or is not reform, with the focus on specific, perhaps more visible points on the torts continuum. Gaining a full understanding of the status of reform in individual states requires

228. *Id.*

229. MCQUILLAN & ABRAMYAN, *supra* note 225, at 15.

230. *Id.* at 65, Table 8. The substantive law rules and reforms considered in the report include: class action reform, contingency attorney-fee limits; whether the state generally uses a contributory, comparative, or modified comparative negligence standard; joint and several liability reform; attorney fee limitations; conditions on the use of expert witnesses; pre-trial screening or arbitration; and products liability reform. *Id.* at 30–31, table 2.

231. ATRA, TORT REFORM RECORD 1 (July 10, 2006), at http://www.atra.org/files.cgi/7990_Record7-06.pdf.

232. *Id.*

233. See ATRA, *At a Glance*, <http://www.atra.org/about/> (last visited Nov. 8, 2006).

more than a litmus test. The following discussion puts legislative reform in Minnesota in a broader context in order to provide a more accurate means of assessing Minnesota legislative reform.

Legislative interventions have had a significant impact in shaping Minnesota tort law. Perhaps the most significant legislative reform was the 1913 adoption of the Workers' Compensation Act,²³⁴ which substituted a no-fault compensation scheme for the prior tort liability regime in cases involving workplace injuries. The Minnesota No-Fault Automobile Insurance Act,²³⁵ which became effective in 1975, made automobile insurance mandatory,²³⁶ added a new form of insurance, basic economic loss insurance,²³⁷ and imposed limitations, called tort thresholds,²³⁸ on the right to recover for non-economic detriment in actions against insured drivers. No-fault automobile insurance was a response to perceived inequities in automobile accident litigation. The legislature's statement of purpose provides the justification:

The detrimental impact of automobile accidents on uncompensated injured persons, upon the orderly and efficient administration of justice in this state, and in various other ways requires that sections 65B.41 to 65B.71 be adopted to effect the following purposes:

- (1) to relieve the severe economic distress of uncompensated victims of automobile accidents within this state by requiring automobile insurers to offer and automobile owners to maintain automobile insurance policies or other pledges of indemnity which will provide prompt payment of specified basic economic loss benefits to victims of automobile accidents without regard to whose fault caused the accident;
- (2) to prevent the overcompensation of those automobile accident victims suffering minor injuries by restricting the right to recover general damages to cases of serious injury;
- (3) to encourage appropriate medical and rehabilitation treatment of the automobile accident victim by assuring prompt payment for such

234. See MINN. STAT. §§ 176.001-.862 (2004).

235. *Id.* §§ 65B.41-.71 (2004).

236. *Id.* § 65B.49, subdiv. 1.

237. *Id.* § 65B.44.

238. *Id.* § 65B.51, subdiv. 3.

treatment;

(4) to speed the administration of justice, to ease the burden of litigation on the courts of this state, and to create a system of small claims arbitration to decrease the expense of and to simplify litigation, and to create a system of mandatory intercompany arbitration to assure a prompt and proper allocation of the costs of insurance benefits between motor vehicle insurers;

(5) to correct imbalances and abuses in the operation of the automobile accident tort liability system, to provide offsets to avoid duplicate recovery, to require medical examination and disclosure, and to govern the effect of advance payments prior to final settlement of liability.²³⁹

On occasion, the legislature supplements the common law by permitting recovery for damages in certain cases where the common law barred recovery. The Wrongful Death Act²⁴⁰ permits recovery of pecuniary loss “for the exclusive benefit of the surviving spouse and next of kin.”²⁴¹ The common law rule was that the cause of action died with the person.²⁴² The legislature initially capped damages in wrongful death cases, but those caps have been eliminated.

The Civil Damage Act²⁴³ provides a cause of action for “[a] spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person . . . against a person who caused the intoxication of

239. *Id.* § 65B.42. *See also* MICHAEL K. STEENSON & MICHAEL FARGIONE, MINNESOTA NO-FAULT AUTOMOBILE INSURANCE, ch. 1 (3d ed. 2005) (providing a more detailed analysis of the history of no-fault insurance in Minnesota).

240. MINN. STAT. § 573.02 (2004).

241. *Id.*, subdiv. 1. The survival statute, Minnesota Statutes section 573.01 (2004), provided that “[a] cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in section 573.02,” and that “[a]ll other causes of action by one against another, whether arising on contract or not, survive to the personal representatives of the former and against those of the latter.” MINN. STAT. § 573.01 (2004). The original survival statute was drawn verbatim from the territorial survival statute. *See Lavalley v. Kaupp*, 240 Minn. 360, 361–62, 61 N.W.2d 228, 229–30 (1953) (setting out history of the survival statute).

242. *See Eklund v. Evans*, 211 Minn. 164, 167, 300 N.W. 617, 619 (1941).

243. MINN. STAT. § 340A.801 (2004).

that person by illegally selling alcoholic beverages.”²⁴⁴ The Act applies to persons who are in the business of selling alcohol,²⁴⁵ although the legislature has permitted two forms of social host action, one common law²⁴⁶ and one statutory,²⁴⁷ in cases where a social host provides or furnishes alcohol to a minor.

A. *1978 Reforms*

To achieve a broader picture of legislative reform of the tort system in Minnesota, however, the next part of this discussion focuses on legislative reformation of the tort system over the past approximately thirty years. The first broad set of reforms aimed at the tort system was enacted by the legislature in 1978, although in retrospect, the effectiveness of the reforms is questionable. The 1978 reforms were focused in part on products liability law and included the adoption of a four-year statute of limitations for strict liability claims arising out of the “manufacture, sale, use or consumption of a product,”²⁴⁸ and a two-year statute of limitations for claims against persons who apply pesticides.²⁴⁹

The 1978 reforms also included a limitation on pleading damages:

In a pleading in a civil action which sets forth an unliquidated claim for relief, whether an original claim, cross-claim, or third-party claim, if a recovery of money is demanded in an amount less than \$50,000, the amount shall be stated. If a recovery of money in an amount greater than \$50,000 is demanded, the pleading shall state merely that recovery of reasonable damages in an amount greater than \$50,000 is sought.²⁵⁰

The statute imposes no limitations on damages, but only a limitation on pleading. It limits whatever adverse impact the pleading of large sums of damages has on the public’s perception

244. *Id.*, subdiv. 1. The action is limited to cases arising out of the commercial sale of alcohol.

245. *Koehnen v. Dufuor*, 590 N.W.2d 107, 110 (Minn. 1999).

246. MINN. STAT. § 340A.801, subdiv. 6 (2004). *See also* Michael K. Steenson, *With the Legislature's Permission and the Supreme Court's Consent, Common Law Social Host Liability Returns to Minnesota*, 21 WM. MITCHELL L. REV. 45 (1995) (analyzing social host liability).

247. MINN. STAT. § 340A.90 (2004).

248. *Id.* § 541.05, subdiv. 2.

249. *Id.* § 541.07 (7).

250. *Id.* § 544.36.

of the civil justice system.

The legislature adopted comparative negligence in 1969,²⁵¹ doing away with the all-or-nothing rule of contributory negligence. Recovery was barred only if the percentage of negligence assigned to the person seeking recovery was equal to or greater than the negligence of the person against whom recovery was sought.²⁵² The 1978 legislation,²⁵³ modeled in part on the Uniform Comparative Fault Act,²⁵⁴ made significant changes in the law. It provided for the comparison of fault, rather than negligence. It also shifted to the Wisconsin-modified form of comparative fault, in which a person is barred from recovery only if that person's fault is greater than the fault of the person from whom recovery is sought, giving the tiebreaker to the plaintiff.²⁵⁵ The amendment also limited joint and several liability in Minnesota for the first time²⁵⁶ by adopting a loss reallocation provision that required any uncollectible loss to be reallocated among all the remaining at-fault parties to the litigation.²⁵⁷ The rationale was that uncollectible amounts should not be the sole responsibility of jointly and severally liable tortfeasors in cases where the plaintiff was also at fault.

The legislation retained an exception for products liability cases, however. In cases where part of a judgment is not collectible from a party in the chain of manufacture and distribution, the uncollectible amount is reallocated only among the other parties in the chain of manufacture and distribution, and not to the plaintiff.²⁵⁸

The 1978 reforms also included a useful life statute,²⁵⁹ which provides that it "is a defense to a claim against a designer, manufacturer, distributor or seller of the product or a part thereof, that the injury was sustained following the expiration of the ordinary useful life of the product."²⁶⁰ A product's useful life "is not

251. Act of May 23, 1969, ch. 624, § 1, 1969 Minn. Laws 1069.

252. *Id.*

253. Act of April 5, 1978, ch. 738, § 6–7, 1978 Minn. Laws 839–40.

254. *See* Lesmeister v. Dilly, 330 N.W.2d 95, 101–02 (Minn. 1983).

255. MINN. STAT. § 604.01, subdiv. 1 (2004).

256. *See* Michael K. Steenson, *Joint and Several Liability Minnesota Style*, 15 WM. MITCHELL L. REV. 969 (1989) (discussing history of joint and several liability).

257. *Id.* § 604.02, subdiv. 2.

258. MINN. STAT. § 604.02, subdiv. 3 (2004).

259. *Id.* § 604.03.

260. *Id.*, subdiv. 1. The statute stops short of being a statute of repose, which would set a specified date after the sale of a product after which liability cannot be imposed for injuries caused by the product.

necessarily the life inherent in the product, but is the period during which with reasonable safety the product should be useful to the user.”²⁶¹ In *Hodder v. Goodyear Tire & Rubber Co.*,²⁶² the supreme court in effect rendered the statute a non-factor in holding that “the expiration of a product’s useful life under section 604.03 is a factor to be weighed by the jury in determining the fault of the manufacturer and the fault of the user.”²⁶³

The reforms included a notice statute requiring “[t]he attorney for a person who intends to claim damage for or on account of personal injury, death or property damage arising out of the manufacture, sale, use or consumption of a product” to provide “a notice of possible claim stating the time, place and circumstances of events giving rise to the claim and an estimate of compensation or other relief to be sought.”²⁶⁴ Failure to provide notice does not affect the validity of the claim, but may subject a person who fails to give notice to a claim for damages, costs, and attorneys fees.²⁶⁵ To date, there are no reported decisions indicating that sanctions have been imposed under this section for failure to provide the necessary notice.

A major part of the 1978 reform legislation was the initial punitive damages statute providing that “[p]unitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.”²⁶⁶ The statute also specified under what circumstances punitive damages can properly be awarded against a master or principal because of an act done by an agent.²⁶⁷ The statute was amended in the 1990 reform legislation, which retained the clear and convincing evidence standard while modifying the standards necessary for imposition of punitive damages.²⁶⁸

The 1978 reform legislation also included a bad faith statute, which allowed the district court, upon motion of a party prevailing as to an issue in a civil action, in its discretion to award that party

261. *Id.*, subdiv. 2.

262. 426 N.W.2d 826 (Minn. 1988).

263. *Id.* at 832.

264. MINN. STAT. § 604.04, subdiv. 1 (2004).

265. *Id.*, subdiv. 3.

266. Act of April 5, 1978, ch. 738, § 4, 1978 Minn. Laws 838 (amending MINN. STAT. § 549.20).

267. *Id.*

268. Act of May 3, 1990, ch. 555, §§ 15–18, 1990 Minn. Laws 1563–64 (amending MINN. STAT. § 549.20).

costs, disbursements, reasonable attorney fees, and witness fees relating to the issue, if the party or attorney against whom costs, disbursements, reasonable attorney fees, and witness fees are charged, acted in bad faith with respect to that issue.²⁶⁹ The statute was repealed and merged into a new bad faith statute, section 549.211, in 1997.²⁷⁰

The final piece of the reform legislation was a \$400,000 cap on damages for loss of consortium, emotional distress, or embarrassment.²⁷¹ It was repealed in 1990 as part of that year's tort reform package.

B. 1980 Reforms

In 1980, the legislature modified products liability law by enacting a statute that limited the liability of parties, other than the manufacturer, in the chain of manufacture and distribution.²⁷²

269. MINN. STAT. § 549.21, *repealed by* Act of May 22, 1997, ch. 213, art. 2, § 6, 1997 Minn. Laws 1924.

270. MINN. STAT. § 549.211 (2004).

271. *Id.* § 549.23 (1988), *repealed by* Act of May 3, 1990, ch. 555, § 23, 1990 Minn. Laws 1565.

272. Minnesota Statutes section 544.41 (2004), reads as follows:

Subdivision 1. Product liability; requirements. In any product liability action based in whole or in part on strict liability in tort commenced or maintained against a defendant other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. The commencement of a product liability action based in whole or part on strict liability in tort against a certifying defendant shall toll the applicable statute of limitation relative to the defendant for purposes of asserting a strict liability in tort cause of action. Subd. 2. Certifying defendant; dismissal of strict liability. Once the plaintiff has filed a complaint against a manufacturer and the manufacturer has or is required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the certifying defendant, provided the certifying defendant is not within the categories set forth in subdivision 3. Due diligence shall be exercised by the certifying defendant in providing the plaintiff with the correct identity of the manufacturer and due diligence shall be exercised by the plaintiff in filing a law suit and obtaining jurisdiction over the manufacturer.

The plaintiff may at any time subsequent to dismissal move to vacate the order of dismissal and reinstate the certifying defendant, provided plaintiff can show one of the following:

(a) That the applicable statute of limitation bars the assertion of a strict liability in tort cause of action against the manufacturer of the product allegedly causing the injury, death or damage
(b) That the identity of the manufacturer given to the plaintiff by

While products liability theory applies to parties in the chain other than manufacturers,²⁷³ the statute tempers the impact of strict liability theory by permitting other sellers to obtain dismissal of strict liability claims against them if the product manufacturer is available and subject to liability in the suit.²⁷⁴ If the intermediary played an active role in the design of a product, or if the manufacturer is not available, strict liability principles apply and an intermediary in the chain of manufacture and distribution may be fully liable.²⁷⁵

the certifying defendant was incorrect. Once the correct identity of the manufacturer has been given by the certifying defendant the court shall again dismiss the certifying defendant;

(c) That the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts of this state, or, despite due diligence, the manufacturer is not amenable to service of process;

(d) That the manufacturer is unable to satisfy any judgment as determined by the court; or

(e) That the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff.

Subd. 3. Dismissal order prohibited. A court shall not enter a dismissal order relative to any certifying defendant even though full compliance with subdivision 1 has been made where the plaintiff can show one of the following:

(a) That the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage;

(b) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

(c) That the defendant created the defect in the product which caused the injury, death or damage.

Subd. 4. Limiting constructing laws. Nothing contained in subdivisions 1 to 3 shall be construed to create a cause of action in strict liability in tort or based on other legal theory, or to affect the right of any person to seek and obtain indemnity or contribution.

273. *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 89, 179 N.W.2d 64, 68 (1970).

274. *In re Shigellosis Litigation*, 647 N.W.2d 1, 6 (Minn. Ct. App. 2002).

275. *Marcon v. Kmart Corp.*, 573 N.W.2d 728 (Minn. Ct. App. 1998), is a good example of what happens if the manufacturer is not available. In that case, a twelve-year-old was rendered quadriplegic while sliding down a hill on a sled made by Paris Manufacturing and sold to the child's parents by Kmart. *Id.* at 730. The sled was defective because of inadequate warnings and the jury awarded damages of slightly less than \$8 million. *Id.* Paris was bankrupt. *Id.* n.1. Kmart, which the jury found to be zero percent at fault, was nonetheless held liable for the full amount because of its position as an intermediary in the chain of manufacture and distribution. *Id.* at 732.

C. 1986 Reforms

The legislature added the collateral source statute in 1986, modifying the common law collateral source rule. The common law collateral source rule provided the plaintiff would not be barred from recovering personal injury costs, even if it meant a double recovery.²⁷⁶ The rationale was based in part on the policies that the defendant should be made to pay for all the damages he caused, that the plaintiff should be entitled to reimbursement for the benefits for which he paid, and that the wrongdoer should not be entitled to receive a windfall by deducting those benefits.²⁷⁷ The collateral source statute now permits the reduction of a jury verdict by the amount of certain "collateral sources" received by the plaintiff up to the time of the verdict.²⁷⁸ The purpose of collateral source statutes is to prevent overcompensation and double recovery. The collateral source statute does not, however, prevent double recovery in all circumstances.²⁷⁹ The reduction is confined to the specified sources and is inapplicable in cases where a

276. *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990).

277. *Smith v. Am. States Ins. Co.*, 586 N.W.2d 784, 786–87 (Minn. Ct. App. 1998).

278. *Imlay*, 453 N.W.2d at 331. Minnesota Statutes section 548.36, subdivision 1 reads as follows:

For purposes of this section, "collateral sources" means payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to:

- (1) a federal, state, or local income disability or Workers' Compensation Act; or other public program providing medical expenses, disability payments, or similar benefits;
- (2) health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments;
- (3) a contract or agreement of a group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care services; or
- (4) a contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability, except benefits received from a private disability insurance policy where the premiums were wholly paid for by the plaintiff.

279. *See Imlay*, 453 N.W.2d at 331. In *Imlay*, the supreme court held that the collateral source statute did not violate the equal protection clauses of the Minnesota and federal constitutions. *Id.* at 332.

subrogation right is asserted.²⁸⁰

A second 1986 reform added a statute precluding the assertion of punitive damages when an action is commenced, but permitting it after amendment if the district court finds prima facie evidence supporting the punitive damages claim.²⁸¹ The term “prima facie” in the statute does not refer to a quantum of evidence, but rather to a procedure for screening out unmeritorious punitive damages claims.²⁸²

The legislature also took its second run at joint and several liability in 1986, retaining the rule of joint and several liability, but providing that “[i]f the state or a municipality . . . is jointly liable, and its fault is less than thirty-five percent, it is jointly and severally liable for an amount no greater than twice the amount of fault.”²⁸³ One of the purposes of the amendment was to protect municipalities against higher insurance rates and judgment awards and to promote fiscal stability of municipalities.²⁸⁴

D. 1988 Reforms

Joint and several liability was the subject of another amendment in 1988. This time, the legislature limited the rule of joint and several liability as applied to defendants other than the state or a municipality to no more than four times the defendant’s fault if that defendant’s fault is fifteen percent or less.²⁸⁵ The need

280. MINN. STAT. § 548.36, subdivs. 1, 2 (2004).

281. Minnesota Statutes section 549.191 (2004) reads as follows:

Upon commencement of a civil action, the complaint must not seek punitive damages. After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

282. *Thompson v. Hughart*, 664 N.W.2d 372, 377 (Minn. Ct. App. 2003).

283. Act of Mar. 25, 1986, ch. 455, § 85, 1986 Minn. Laws 882 (amending MINN. STAT. § 604.02).

284. *Imlay*, 453 N.W.2d at 330. The court in *Imlay* upheld the statute against equal protection attacks under the federal and state constitutions. *Id.* at 331.

285. Act of April 12, 1988, ch. 503, § 3, 1988 Minn. Laws 378 (amending MINN. STAT. § 604.02). As with the rule governing the state and municipalities, this rule was superseded by the elimination of joint and several liability in 2003.

for the percentage cutoffs was eliminated by the 2003 Comparative Fault Act amendment eliminating joint and several liability, subject to certain exceptions.²⁸⁶

In 1988, the legislature also provided for the creation of “a commission to study the civil justice system and current and alternative methods of compensating injured persons.”²⁸⁷ The Commission’s findings and recommendations for legislative action were due on January 1, 1990.²⁸⁸ The Minnesota Injury Compensation Study Commission held hearings on a variety of topics, including “punitive damages; joint and several liability; comparative fault; statutes of limitations and repose; alternative dispute resolution and incentives to alternative dispute resolution; alternative compensation systems and testimony from injured persons on damages; the collateral source statute and attorneys’ fees; damages, additur and remittitur, caps on damages, and periodic payments; and the helmet law, seat belts, homeowners’ insurance, and liquor liability.”²⁸⁹

The Commission recognized both the need for accountability and the importance of compensation in the tort system, and the importance of the legislature, the courts, and the Commission balancing those goals.²⁹⁰ The Commission made recommendations in a variety of areas,²⁹¹ most of which were adopted by the

286. Act of May 19, 2003, 2003 Minn. Laws 386 (amending MINN. STAT. § 604.02).

287. Act of April 12, 1988, ch. 503, § 4, 1988 Minn. Laws 378.

288. *Id.*

289. MINNESOTA INJURY COMPENSATION STUDY COMMISSION, REPORT TO THE LEGISLATURE 1 (1990) [hereinafter REPORT].

290. *Id.*, at 9–10. The Commission also took the position that tort law should consider the following goals:

1. Accountability.
2. Compensation.
3. Predictability.
4. Consistency of results.
5. Risk prevention.
6. Speed of resolution.
7. Accessibility to the system.
8. Fairness of the system.
9. Reasonableness of the costs of the system.

Id.

291. The Committee’s summary of recommendations was as follows:

A. Comparative Fault

1. The Comparative Fault Act should be amended to provide for the application of comparative fault principles in cases involving claims for economic loss.
2. The definition of “fault” in the statute should be amended in four

respects:

- a. Primary assumption of risk should be explicitly excluded as conduct subject to comparison under the act.
- b. The doctrine of last clear chance should be abolished.
- c. The statute should be amended to provide that evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages should not be considered in determining the cause of an accident, but only in determining the damages a claimant is entitled to recover.
- d. The defense of complicity in actions brought under the Civil Damage Act, section 340A.801, should no longer be a complete defense but should be subject to apportionment under section 604.01, the Comparative Fault Act.

B. Statutes of Repose.

Section 541.051, the statute of repose governing claims arising out of improvements to real property, should be amended to exclude from the statute certain products liability actions.

C. Punitive Damages.

1. Subdivision 1 of section 549.20 should be amended to provide for a "deliberate disregard" standard in place of the current "willful indifference" standard, and the deliberate disregard standard should be more specifically defined.
2. Section 549.20, subdivision 2, should be amended to strengthen the standards required to impose liability for punitive damages on a principal or employer for the acts of an agent or employee.
3. A new subdivision 4 should be added to section 549.20 that will require bifurcation of the punitive damages issue upon the request of the defendant.
4. A new subdivision 5 should be added to section 549.20 that will provide specific direction to the courts to review any punitive damages award in light of the factors in section 549.20, subdivision 3.

D. Civil Damage Act

1. Section 340A.801 should be amended to permit social host liability where the social host makes alcoholic beverages available to a minor.
2. The complete defense of complicity should be a partial defense subject to comparison under the Comparative Fault Act.

E. Caps on Damages; Enumeration of Damages.

Sections 549.23, the statutory cap on certain kinds of damages, and section 549.24, requiring enumeration by the finder of fact of certain types of damages, should be repealed.

F. Collateral Sources.

Section 65B.51 and section 548.36 should be amended to require a reduction of any jury verdict first by any collateral sources that must be deducted under the statutes and second, by the claimant's percentage of fault, if any.

G. Seat Belts and Motorcycle Helmets.

1. The penalties for failure to wear seat belts should be increased.
2. Motorcycle helmets should once again be mandatory for all motorcycle operators and passengers.
3. Seat belt evidence should continue to be inadmissible in civil

legislature in its 1990 reform package.

litigation.

4. The current helmet law provision precluding recovery for damages a motorcycle operator or passenger could have avoided by wearing a helmet should be preserved.

H. Household Exclusion in Homeowners' Policies.

The household exclusion should be eliminated through an amendment to section 65A.295.

I. Penalties for Failure to Carry Automobile Insurance.

The penalties for failure to carry automobile insurance as required by the No-Fault Automobile Insurance Act and to carry proof of insurance coverage should be increased through amendments to section 65B.67, 169.791 and 169.793.

J. Medical Assistance Liens.

Section 256B.042 should be amended to bring the State's right to reimbursement for medical assistance payments into line with reimbursement rights under the No-Fault Act, and the nature of the State's reimbursement right should be clarified so that resolution of tort claims is facilitated.

K. Alternative Dispute Resolution.

The Commission approves in substantial part the Final Report of the Minnesota Supreme Court and Minnesota State Bar Association Task Force on Alternative Dispute Resolution.

1. The Commission approves Part I, with the exception of subpart D.1. The Task Force recommendation states that the judge has the power to disagree with the alternative dispute resolution process adopted by the parties and may order the parties to utilize one of the non-binding ADR processes. The Commission takes the position that if the parties agree to the alternative resolution process to be used, the judge should not have the power to interfere with that choice.

Second, as to the timing of the conference, subpart D.1 states that if the parties are unable to agree on the ADR process or the timing of the process, "the court shall schedule a conference with the parties within the next 30 days." The Commission takes the position that the court, within 30 days, should schedule a conference to take place at some later date.

2. The Commission takes no position on Part II of the report, which deals with the training and qualification of neutral persons for court annexed and court referred ADR programs.

L. State and Municipal Tort Liability.

The legislature should study the desirability and financial feasibility of raising the caps on damages for the state and its political subdivisions.

M. Mandatory Automobile Liability Insurance.

The legislature should study the mandatory automobile liability insurance limits in Minnesota, with a view toward increasing those limits.

N. Attorneys Fees

Legislative intervention in the form of regulation of contingent fees is unwarranted.

Id., at 4-7.

E. 1990 Reforms

The initial punitive damages statute, which required a showing that the defendant acted in “willful indifference to the rights or safety of others,” was changed to a “deliberate disregard” standard.²⁹² The statute now requires that the determination of awards for punitive damages be made in a separate proceeding at the request of any of the parties,²⁹³ and it mandates the review of any punitive damages award in light of the factors the statute specifies may be considered in awarding punitive damages.²⁹⁴

The legislature made five changes in the Comparative Fault Act. The first provided for the application of comparative fault in claims for economic loss.²⁹⁵ The remaining changes related to the definition of “fault” in the Act.²⁹⁶ The amendments excluded primary assumption from the definition of “fault” in the Act;²⁹⁷ eliminated the doctrine of last clear chance as a defense; provided that evidence of an unreasonable failure to avoid aggravating an injury or to mitigate damages should not be considered in determining the cause of an accident, but only in determining the damages to which a claimant is entitled;²⁹⁸ and made the previously complete defense of complicity under the Civil Damage Act²⁹⁹ subject to apportionment under the Comparative Fault Act.³⁰⁰ The economic loss claims amendment ensured application of the Act in areas such as professional liability, where negligence principles, including the defense of contributory negligence, apply. The amendments to the definition of “fault” removed potential uncertainties in the Act by eliminating any lingering confusion as to whether the defense of last clear chance or primary assumption of risk would be subject to apportionment.³⁰¹ Making complicity a partial rather than a complete defense reflects the view of

292. Act of May 3, 1990, ch. 555, § 15, 1990 Minn. Laws 1563 (amending MINN. STAT. § 549.20, subdiv. 1).

293. MINN. STAT. § 549.20, subdiv. 4 (2004).

294. *Id.* § 549.20, subdiv. 5.

295. Act of May 3, 1990, ch. 555, § 19, 1990 Minn. Laws 1564 (amending MINN. STAT. § 604.01, subdiv. 1).

296. *Id.*, § 20 (amending MINN. STAT. § 604.01, subdiv. 1(a)).

297. *Id.*

298. *See id.*

299. MINN. STAT. § 340A.801 (2004). *See K.R. v. Sanford*, 605 N.W.2d 387, 392–93 (Minn. 2000) (analyzing the complexity of § 340A.801).

300. MINN. STAT. § 604.01, subdiv. 1(a) (2004).

301. *See REPORT, supra* note 289, at 14–15.

complicity as simply a form of contributory negligence.³⁰² Finally, providing that an unreasonable failure to avoid aggravating damages or to mitigate be considered only in determining damages was an effort to avoid the potential for misapplication of the Act in cases where the plaintiff's negligence (perhaps in failing to act reasonably to mitigate damages after an accident) had nothing to do with causing the initial injury-causing accident.

The Civil Damage Act³⁰³ was amended in 1990 to permit social host liability. Rather than mandating the form of liability, the amendment stated that "[n]othing in this chapter precludes common law tort claims against any person 21 years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years."³⁰⁴

The legislature repealed the \$400,000 cap on general damages.³⁰⁵ The Commission recommended the repeal because the cap was ineffective and applicable in only a small number of cases, and because remittitur by trial courts would be effective to eliminate excessive damages awards.³⁰⁶

The Commission made several recommendations concerning the admissibility of seat belt and motorcycle helmet evidence. It recommended that the penalties for failure to wear seat belts should be increased, wearing motorcycle helmets should once again be mandatory for motorcycle operators and passengers, seat belt evidence should continue to be admissible in civil litigation, and the then-current law permitting the introduction of evidence of failure to wear a motorcycle helmet³⁰⁷ should be preserved.³⁰⁸

302. See *id.* at 40–41.

303. MINN. STAT. § 340A.801 (2004).

304. *Id.* § 340A.801, subdiv. 6. For an analysis of the amendment, see Michael K. Steenson, *With the Legislature's Permission and the Supreme Court's Consent, Common Law Social Host Liability Returns to Minnesota*, 21 WM. MITCHELL L. REV. 45 (1995). The Minnesota Legislature added a somewhat parallel form of social host liability under section 340A.90 in 2000.

305. MINN. STAT. § 549.23, *repealed by* Act of May 3, 1990, ch. 555, § 23, 1990 Minn. Laws 1565.

306. REPORT, *supra* note 289, at 40.

307. MINN. STAT. § 169.974, subdiv. 6, *repealed by* 1999 Minn. Laws, ch. 230, §

46. Prior to repeal, subdivision 6 read as follows:

In an action to recover damages for negligence resulting in any head injury to an operator or passenger of a motorcycle, evidence of whether or not the injured person was wearing protective headgear that complied with standards established by the commissioner of public safety shall be admissible only with respect to the question of damages for head injuries. Damages for head injuries of any person who was not wearing protective

The legislature did not increase the penalties for failure to wear seat belts, and it rejected reintroducing the mandatory helmet law.

Minnesota's statute of repose for improvements to real property³⁰⁹ has been the subject of a significant amount of litigation.³¹⁰ One of the recurring problems has concerned the applicability of the statute to property where a separate and

headgear shall be reduced to the extent that those injuries could have been avoided by wearing protective headgear that complied with standards established by the commissioner of public safety. For the purposes of this subdivision "operator or passenger" means any operator or passenger regardless of whether that operator or passenger was required by law to wear protective headgear that complied with standards established by the commissioner of public safety.

MINN. STAT. § 169.974, subdiv. 6 (1998).

308. REPORT, *supra* note 289, at 48–51.

309. Minnesota Statutes section 541.051 (2004) reads in part as follows:

Subdivision 1. Limitation; service or construction of real property; improvements. (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury or, in the case of an action for contribution or indemnity, accrual of the cause of action, nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

(b) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury or, in the case of an action for contribution or indemnity, upon payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.

(c) Nothing in this section shall apply to actions for damages resulting from negligence in the maintenance, operation or inspection of the real property improvement against the owner or other person in possession.

Subd. 2. Action allowed; limitation. Notwithstanding the provisions of subdivision 1, in the case of an action which accrues during the ninth or tenth year after substantial completion of the construction, an action to recover damages may be brought within two years after the date on which the action accrued, but in no event may an action be brought more than 12 years after substantial completion of the construction.

Id.

310. *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977); *Citizens Sec. Mut. Ins. Co. of Red Wing v. General Elec. Corp.*, 394 N.W.2d 167 (Minn. Ct. App. 1986).

identifiable product is part of the improvement. To ensure that the statute of repose does not apply to certain products liability cases, the legislature amended the statute to provide that it is inapplicable “to the manufacturer or supplier of any equipment or machinery installed upon real property.”³¹¹

The collateral source statute and no-fault act had initially been silent about the order of the reduction of damages in a case where both the collateral source or no-fault act and the Comparative Fault Act applied. The legislature amended the statutes in 1990 so that the comparative fault reduction is made after damages are reduced by collateral sources or the offset required by the no-fault act.³¹²

The Commission recommended that the legislature consider raising the caps on state and municipal tort liability.³¹³ The legislature subsequently raised the caps in 1997 and in the 2006 session raised the caps again, effective January 1, 2008.³¹⁴

The Commission also took the position that legislative intervention in the form of contingent fee regulation was unwarranted: “peer pressure and attorney education are the best means of ensuring that the contingent fee will not be abused.”³¹⁵

The Commission also recommended that the legislature should study the mandatory automobile liability insurance limits in Minnesota, with a view toward increasing the limits. The legislature did not accept the recommendation. The automobile liability limits³¹⁶ were last raised in 1985 and have remained at that level.

F. Reforms Since 1990

Since 1990, there have not been equivalent tort reform packages. The legislature significantly reformed joint and several liability, one of the standard targets of tort reform. After chipping away at joint and several liability in 1978, 1986, and 1988, the legislature finally abolished the rule, subject to limited exceptions,

311. MINN. STAT. § 541.051, subdiv. 1(d) (2004).

312. Act of May 3, 1990, ch. 555, § 6, 1990 Minn. Laws 1560 (amending MINN. STAT. § 65B.51, subdiv. 1); *Id.* § 24, 1990 Minn. Laws 1565 (adding MINN. STAT. § 548.36, subdiv. 3(c)).

313. See MINN. STAT. § 466.04 (2004).

314. Act of May 24, 2006, ch. 232, §§ 1, 2, 2006 Minn. Sess. Law Serv. 203–04 (West) (amending MINN. STAT. § 466.04).

315. REPORT, *supra* note 289, at 62.

316. MINN. STAT. § 65B.49, subdiv. 3 (2004). The liability limits stand at \$30,000 bodily injury per person, subject to a \$60,000 per accident limitation, with \$25,000 in property damage coverage. *Id.*

in 2003.³¹⁷ In 2005, the legislature amended the appeal bond requirement that the amount of the bond “be in the amount of the judgment, or a lesser amount approved by the court in the interests of justice,” but providing that “[t]he total appeal bond that is required of all appellants must not exceed \$150,000,000, regardless of the value of the judgment.”³¹⁸

The point of this somewhat extended analysis of legislative reform of the tort system is simply to indicate that the legislature has not gone to extremes in limiting the availability of tort remedies. While tort rules that worked to the advantage of injured persons have been restricted on occasion, as in the joint and several liability legislation, other legislative amendments have worked in favor of injured persons, such as the legislative elimination of its cap on general damages, the increases on caps on damages for claims against the state and municipalities, and the creation of social host liability. Some of the legislation has been effective in limiting frivolous litigation, such as the affidavit requirement necessary to support medical negligence claims.

G. Summary

The conclusion that seems inescapable is that legislative reform of the tort system has been balanced in Minnesota. Reform legislation has not radically altered the availability of tort remedies. The 1978 reform package was directed primarily at products

317. Minnesota Statutes section 604.02, subdivision 1, currently reads as follows:

When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:

- (1) a person whose fault is greater than 50 percent;
- (2) two or more persons who act in a common scheme or plan that results in injury;
- (3) a person who commits an intentional tort; or
- (4) a person whose liability arises under chapters 18B – pesticide control, 115 – water pollution control, 115A – waste management, 115B – environmental response and liability, 115C – leaking underground storage tanks, and 299J – pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.

MINN. STAT. § 604.02, subdiv. 1 (2004).

318. MINN. STAT. ANN. § 550.36 (West Supp. 2006).

liability law, but its impact was insignificant. If anything, the comparative fault amendments in that year facilitated recovery. The 1990 reform package is the best indication of balanced reform. The Legislative Study Commission recommended moderation, and the legislature packaged a series of reforms that clarified or filled gaps in existing legislation and eliminated inequities in the tort system, but without making radical changes. Subsequent legislation is problem-specific, for the most part. From the standpoint of “tort reform,” probably the most significant changes have been the medical negligence affidavit requirement and the 2003 abandonment of joint and several liability, with only limited exceptions. Minnesota may not score high on “tort reform” assessments, but, on the other hand, it may well be that there is less to react to in terms of the common law of torts as structured by the supreme court.

IV. IS THE TORT SYSTEM PROGRESSIVE?

Instead of asking whether a specific tort system is progressive, the question might be asked whether it is liberal or conservative; but those terms also may present problems of definition. A liberal decision, whether judicial or legislative, might be defined as one that favors the right of a plaintiff by adopting a rule that enhances the plaintiff’s opportunity to recover for injury, either by removing a barrier to that recovery, by adopting a new cause of action, or by extending the right to recover in the context of a settled claim. A conservative decision might be labeled as one that generally favors a more restricted tort system.³¹⁹ So a decision that retards or limits the ability of an injured person to recover might be deemed a conservative decision. Maintaining the status quo may be a liberal or conservative response, depending on how current rules are viewed.

There are problems in defining progressivism or what progressive legal thought is, and also problems in discerning whether concepts of progressivism can readily be applied to a tort system.³²⁰ Professor Hovenkamp has noted the importance of a legislative emphasis on wealth redistribution as a characteristic of progressives:

319. See Anita Bernstein, *Muss Es Sein? Not Necessarily, Says Tort Law*, 67 LAW & CONTEMP. PROBS. 7, 9 (2004).

320. See *id.* at 8.

The greatest achievement of Progressive legal policy is the modern welfare state. Progressive legal thought was characterized by a belief that government regulation often allocates resources better than private markets. Because the common law is poorly equipped to redistribute wealth or manage the economy, most Progressives were strongly committed to legislation, rather than changes in judge-made law, to facilitate their goals. The Progressives also had a vision of government that was essentially "republican" rather than libertarian, or contractarian. By republican, I mean that Progressives believed that government officials should use economics, the social sciences, ethics, or other objective criteria to help define the best policy. They did not believe that policymaking was an exercise in measuring the preferences of individual citizens by tabulating their votes. Finally, and perhaps most importantly, Progressive legal thought was dedicated to the propositions that total social welfare would be increased if wealth was distributed more evenly across society and that the state should take an active role in such redistribution.³²¹

Progressivism in one sense might seem at odds with tort law insofar as it would encourage the replacement of tort law with a system of social insurance. It might be argued that the early progressive agenda advanced by torts scholars, including, for example, the elimination of immunities, expansion of products liability law, and abolition of the special duty rules in cases involving landowner liability, would be inconsistent with that goal.³²² But it might also be argued that a set of tort rules that maximizes the potential for compensation is consistent with a second-best reliance on common law rules where significant legislative reform is not practically or politically feasible. In that sense, it might be used to define a system of plaintiff-oriented rules that maximize the potential for compensation.³²³ It might be

321. Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV. 149, 149 (1995). Professor Hovenkamp argues that the end of Progressive legal thought can be dated to the 1960s, with the infusion of a renewed interest in an unregulated market which, coupled with critiques of the democratic process, represented "a sharp turn from the essentially republican vision of government that dominated progressive legal thought to a more classical view emphasizing both the efficiency and robustness of private markets and the many imperfections of public processes." *Id.* at 150.

322. Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031, 1043-44 (2003).

323. See Michael Rustad, *The Jurisprudence of Hope: Preserving Humanism in Tort Law*, 28 SUFFOLK U.L. REV. 1099 (1994).

argued that law is progressive, then, insofar as it contains incentives toward the redistribution of wealth and empowers hurt individuals who seek redress for their injuries, even if it is through a common law mechanism.³²⁴ Taking a long view of tort law by focusing on the decisions of the last half century might justify an argument that tort law has been progressive in Minnesota. Conversely, narrowing the focus by breaking down the decisions of the Minnesota Supreme Court and viewing the court's reasoning as it responds on a case-by-case to the challenges of determining what the principles governing compensation should be, one sees decisions based on a patchwork of policies that are not consistently progressive in outlook.

While systems may have both progressive and anti-progressive effects,³²⁵ if the focus is on the broader tort system—a melded common law and legislative approach to liability for injury—it is much more difficult to characterize that system as progressive. The Minnesota State Legislature's approach to the tort system may, depending on where the emphasis is placed, have progressive elements, but it too would be difficult to characterize as progressive. The legislature's most detailed reform foray, the 1990 reform package, is a balanced response to a variety of issues that were considered by that year's legislative study commission.

Dr. Weinstein, in his introductory article in this Symposium,³²⁶

324. See Bernstein, *supra* note 319, at 25. Courts will ultimately determine whether legislative reforms unduly impair the right to recovery in a tort system. John C.P. Goldberg, in *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 626 (2005), emphasizes that “[t]he law of redress is basic to our conception of liberal-constitutional government, and was built into the fabric of our legal system.” *Id.* In considering criticisms of judicial decisions striking down tort reform statutes, he argues that critics are wrong in supposing that there is legislative primacy in the area, and that courts “are entitled to ask, and should ask, whether a given reform unduly burdens the ability of individuals to vindicate their rights and interests by obtaining redress from others who have wrongfully injured them.” *Id.* at 727–27. If the reform does that, courts should hold the reform unconstitutional in violation of due process. *Id.*

325. *Id.* at 24.

326. See Jack Russell Weinstein, *On the Meaning of the Term Progressive: A Philosophical Investigation*, 33 WM. MITCHELL L. REV. 1 (2006). Richard Hofstadter defined “Progressivism” as follows:

[T]hat broader impulse toward criticism and change that was everywhere so conspicuous after 1900, when the already forceful stream of agrarian discontent was enlarged and redirected by the growing enthusiasm of middle-class people for social and economic reform. As all observant contemporaries realized, Progressivism in this larger sense was not

engages in a lengthy philosophical inquiry into the meaning of progressivism; he expresses reluctance to define it, although he does offer a tentative definition of a progressive as “a person who believes that social reform is achievable over time with the proper mixture of individual participation and government support.”³²⁷ The progressive looks forward and recognizes that there is a universal standard for justice while acknowledging that only by understanding particular contexts and circumstances can the adequacy of the progress be measured. There is a strong egalitarian underpinning to progressivism. Group identification is essential to any understanding of how the benefits of progress should be distributed, but that should not eclipse the unique situation of each person who seeks those benefits. He concludes by emphasizing that “the progressive seeks moderation: moderation in change, moderation in assistance, and moderation in autonomy.”³²⁸ Minnesota’s tort system may fit that concept in part, but it seems clear that if it does, it is a moderate system.

V. CONCLUSION

One of the issues concerning labels is whether they make any difference in assessing the value of a particular system. If Minnesota’s tort system is deemed to be progressive, so what? Does it provide a basis for an assessment of where the supreme court will go when faced with cutting-edge issues? Will it give the legislature pause in dealing with tort reform issues?

confined to the Progressive Party but affected in a striking way all the major and minor parties and the whole tone of American political life. It was, to be sure, a rather vague and not altogether cohesive or consistent movement, but this was probably the secret of its considerable successes, as well as of its failures. While Progressivism would have been impossible without the impetus given by certain social grievances, it was not nearly so much the movement of any social class, or coalition of classes, against a particular class or group as it was a rather widespread and remarkably good-natured effort of the greater part of society to achieve some not very clearly specified self-reformation. Its general theme was the effort to restore a type of economic individualism and political democracy that was widely believed to have existed earlier in America and to have been destroyed by the great corporation and the corrupt political machine; and with that restoration to bring back a kind of morality and civil purity that was also believed to have been lost.

RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 5 (Knopf 1972) (1955).

327. Weinstein, *supra* note 326, at 50.

328. *Id.*

The label may not provide a basis for predicting where the court will go in an individual case, of course. Its decisions provide a clear indication of that. Case-by-case development of the common law may narrow the focus to the particular set of policy considerations that are relevant in an individual case, as gleaned from the court's prior precedents, rather than expanding the question to one of the fundamental purposes of the tort system.

It may help put the tort system in context, however, in the face of continuing calls for the reform of the system. The powerful drumbeat of tort reform prompts judgments about the tort system, applying a litmus test that results in the classification of states according to the degree of reform they have achieved, irrespective of the labels. The judgment of imbalance is typically made based on a reform headcount of key legislative initiatives, without a detailed overview of the tort system. The detail is warranted and necessary, however, if there is to be a valid judgment about whether there are tort system excesses, particularly in the stated law.